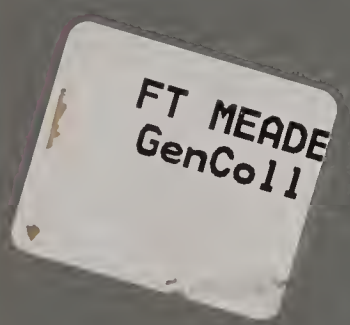

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CONTEMPTS OF COURT

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES

DECEMBER 7, 8, 9, AND 11, 1911

SIXTY-SECOND CONGRESS
SECOND SESSION

WASHINGTON
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1911

COMMITTEE ON THE JUDICIARY.

HOUSE OF REPRESENTATIVES.

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EDWIN Y. WEBB, North Carolina.	JOHN W. DAVIS, West Virginia.
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J. J. SPEIGHT, *Clerk.*

CONTEMPTS OF COURT.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Washington, D. C., Thursday, December 7, 1911.

The committee met at 10.30 o'clock a. m., Hon. Henry D. Clayton, chairman, presiding, a quorum being present.

The CHAIRMAN. Gentlemen of the committee, on the 16th day of August last this committee adopted the following motion:

That this bill [H. R. 13578, to define and punish contempts of court] be made a special and continuing order for consideration and hearing thereon by the whole committee, beginning on Thursday, December 7, 1911.

This meeting to-day is, therefore, called for the express purpose of considering the bill H. R. 13578 and all other bills on the same subject. You will find copies of these bills before you. Bills relating to this subject have heretofore been considered in both branches of Congress. For instance, Hr. Hill, a Senator from New York, reported favorably in the Fifty-fourth Congress, at the first session, on April 30, 1896, Senate bill 2984, dividing contempts of court into direct and indirect contempts and defining the same; also afterwards, in the Fifty-fourth Congress, on January 18, 1897, Mr. Ray, who was then chairman of the Judiciary Committee of the House (he is now one of the United States district judges in the State of New York), reported favorably a substitute for the Senate bill 2984, known as the Hill bill, on this subject of contempts.

The Ray bill or substitute also divides contempts into direct and indirect contempts and follows some of the ideas of the Hill bill. I may say that it follows all of the ideas of the Hill bill substantially, but it enlarges upon the Hill bill, particularly in the matter of the provisions for the trial of indirect contempt cases. I have before me a copy of the report which Senator Hill made in the Senate on the bill I have referred to, and also a copy of the report which Mr. Ray

made from the Judiciary Committee of the House on his substitute for the Hill bill. I have also collated, for the benefit of the committee, all the United States statutes relating to contempts of court, beginning with the one enacted at the first session of the First Congress of the United States, being chapter 20 of the act approved September 24, 1789, and down to and including the provision that is now in the new Judicial Code (sec. 268) that has been adopted and will go into effect on January 1. I have also had collated the statutory provisions of the various States of the Union in regard to contempts of court, beginning with the States in their alphabetical order, that is, beginning with Alabama and winding up with Wyoming. All of this information I have had collated for the benefit of the committee, but at this time I do not think it advisable to arrest the proceedings of the committee to read or refer in detail to Senator Hill's report or to Judge Ray's report, or with more particularity to the provisions of the Hill bill or the Ray bill. I shall print as part of the hearings the Hill bill and the report thereon, and the Ray bill and the report thereon. They are as follows:

THE HILL BILL.

[S. 2984, Fifty-fourth Congress, first session.]

AN ACT In relation to contempts of court.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That contempts of court are divided into two classes, direct and indirect, and shall be proceeded against only as hereinafter prescribed.

SEC. 2. That contempts committed during the sitting of the court or of a judge at chambers, in its or his presence or so near thereto as to obstruct the administration of justice, are direct contempts. All others are indirect contempts.

SEC. 3. That a direct contempt may be punished summarily without written accusation against the person arraigned, but if the court shall adjudge him guilty thereof a judgment shall be entered of record in which shall be specified the conduct constituting such contempt, with a statement of whatever defense or extenuation the accused offered thereto and the sentence of the court thereon.

SEC. 4. That upon the return of an officer on process or an affidavit duly filed, showing any person guilty of indirect contempt, a writ of attachment or other lawful process may issue and such person be arrested and brought before the court; and thereupon a written accusation setting forth succinctly and clearly the facts alleged to constitute such contempt shall be filed and the accused required to answer the same, by an order which shall fix the time therefor, and also the time and place for hearing the matter; and the court may, on proper showing, extend the time so as to give the accused a reasonable opportunity to purge himself of such contempt. After the answer of the accused, or if he refuse or fail to answer, the court may proceed at the time so fixed to hear and determine such accusation upon such testimony as shall be produced. If the accused answer, the trial shall proceed upon testimony produced as in criminal cases, and the accused shall be entitled to be confronted with the witnesses against him; but such trial shall be by the court, or upon application of the accused, a trial by jury shall be had as in any criminal case. If the accused be found guilty judgment shall be entered accordingly prescribing the punishment.

SEC. 5. That the testimony taken on the trial of any accusation of indirect contempt may be preserved by bill of exceptions, and any judgment of conviction therefor may be reviewed upon direct appeal to, or by writ of error from, the Supreme Court, and affirmed, reversed, or modified as justice may require. Upon allowance of an appeal or writ of error execution of the judgment shall be stayed upon the giving of such bond as may be required by the court or a judge thereof, or by any justice of the Supreme Court.

SEC. 6. That the provisions of this act shall apply to all proceedings for contempt in all courts of the United States except the Supreme Court; but this act shall not affect any proceedings for contempt pending at the time of the passage thereof.

(Passed the Senate June 10, 1896.)

Attest: WM. R. COX,
Secretary.

Let it here be noted that the Hill bill, as it was originally introduced, was amended in the Senate on June 9, 1896 (see Cong. Rec., 54th Cong., 1st sess., vol. 28, part 7, p. 6322), as it was reported on by having stricken from it, after the word "court," in the latter part of the next to the last sentence in paragraph four of the bill the words, "in its discretion"; and the word "may" in the same sentence was changed to "shall"; and the sentence was made to conclude with the following words: "but such trial shall be by the court, or upon application of the accused, a trial by jury shall be had as in any criminal case."

In Senate Document 190, Fifty-seventh Congress, first session, this amendment of the Hill bill, as it passed the Senate, is not noted.

The following is a copy of the Senate report on this bill:

[Senate Report No. 827, Fifty-fourth Congress, first session.]

The Committee on the Judiciary, to whom was referred Senate resolution No. 83, which was as follows:

"*Resolved*, That the Judiciary Committee is hereby directed to investigate the law upon the whole subject of 'Contempts of court,' as enforced by the Federal courts, and to report to the Senate whether any additional legislation is necessary for the protection of the rights of citizens; and if so, to report such legislation;" and to whom was also referred Senate bill No. 418, entitled "A bill concerning the trial and punishment of contempts of the United States courts herein mentioned," respectfully report:

In obedience to the resolution aforesaid, the committee have duly investigated and considered the whole subject of "Contempts of courts," as enforced by the Federal courts, and believing that some additional legislation is necessary, or at least desirable, upon that subject, recommend the passage of said Senate bill No. 418 with an amendment striking out the title and all the provisions of said bill, and in their place inserting the following:

"A BILL In relation to contempts of court.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That contempts of court are divided into two classes, direct and indirect, and shall be proceeded against only as hereinafter prescribed.

"SEC. 2. That contempts committed during the sitting of the court, or of a judge at chambers, in its or his presence or so near thereto as to obstruct the administration of justice, are direct contempts. All other are indirect contempts.

"SEC. 3. That a direct contempt may be punished summarily without written accusation against the person arraigned, but if the court shall adjudge him guilty thereof a judgment shall be entered of record in which shall be specified the conduct constituting such contempt, with a statement of whatever defense or extenuation the accused offered thereto and the sentence of the court thereon.

"SEC. 4. That upon the return of an officer on process or an affidavit duly filed, showing any person guilty of indirect contempt, a writ of attachment or other lawful process may issue, and such person be arrested and brought before the court; and thereupon a written accusation, setting forth succinctly and clearly the facts alleged to constitute such contempt, shall be filed and the accused required to answer the same, by an order which shall fix the time therefor, and also the time and place for hearing the matter; and the court may, on proper showing, extend the time so as to give the accused a reasonable opportunity to purge himself of such contempt. After the answer of the accused, or if he refuse or fail to answer, the court may proceed at the time so fixed to hear and determine such accusation upon such testimony as shall be produced. If the accused answer, the trial shall proceed upon testimony produced as in criminal cases, and the accused shall be entitled to be confronted with the witnesses against him; but such trial shall be by the court, or, in its discretion, upon application of the accused, a trial by jury may be had as in any criminal case. If the accused be found guilty judgment shall be entered accordingly, prescribing the punishment.

"SEC. 5. That the testimony taken on the trial of any accusation of indirect contempt may be preserved by bill of exceptions, and any judgment of conviction therefor may be reviewed upon direct appeal to or by writ of error from the Supreme Court and affirmed, reversed, or modified, as justice may require. Upon allowance of an appeal or writ of error execution of the judgment shall be stayed, upon the giving of

such bond as may be required by the court or a judge thereof, or by any justice of the Supreme Court.

"SEC. 6. That the provisions of this act shall apply to all proceedings for contempt in all courts of the United States except the Supreme Court; but this act shall not affect any proceedings for contempt pending at the time of the passage thereof."

The following is a copy of the report on the Ray bill or substitute and embraces a copy of the bill itself:

[House Report No. 2471, Fifty-fourth Congress, second session.]

The Committee on the Judiciary, having carefully considered Senate bill 2984, report as follows:

The right and power of courts to punish for contempts is inherent and absolutely essential to the existence of the court as such. (Rapalje on Contempts, etc.) Its exercise is more frequent in chancery practice, it being, in many cases, the only way in which a court of equity can enforce its orders and decrees.

This power is not lightly to be interfered with or curtailed, and very little legislation has been attempted or deemed necessary on the subject.

Section 725 of the Revised Statutes of the United States provides as follows:

"The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts."

In fact this is but declaratory of the common law, and is restrictive if anything. Section 1070 (Rev. Stat. U. S.) expressly confers this power on the Court of Claims.

The power is recognized in consular courts (sec. 4104, Rev. Stat. U. S.). It was given to courts in bankruptcy (sec. 4975, Rev. Stat. U. S.), to the judges at chambers in such proceedings. (Rev. Stat. U. S., sec. 4973.)

Indeed it has been held that—

"In the absence of a constitutional provision on the subject legislative bodies have not power to limit or even regulate the inherent power of courts to punish for contempts. This power being necessary to the very existence of a court, as such, the legislature has no right to take it away or hamper its free exercise." (Rapalje on Contempts, p. 13, and cases there cited.)

This has no application to the circuit and district courts of the United States, they being creatures of Congress. (Ex parte Robinson, 19 Wall., U. S., 505, 510.)

It is a well-settled rule that that court alone in which a contempt is committed, or whose order or authority is defied, has power to punish it or to entertain proceedings to that end. (Rapalje on Contempts, p. 15.)

The tendency of legislation in this country, however, has been to narrow the definition of the offense, diminish the class of persons to whom it can be imputed, and restrict the power of the courts over it, especially by limiting their power to fine and imprison. (Rapalje on Contempts, p. 14, and cases there cited.)

The Senate bill (S. 2984, passed the Senate June 10, 1896) divides contempts into two classes, "direct contempts" and "indirect contempts." "Contempts committed during the sitting of the court, or of a judge at chambers, in its or his presence, or so near thereto as to obstruct the administration of justice," are classified as "direct contempts" and may be summarily dealt with and punished by the court or judge at chambers, while "all other" contempts are classified as "indirect contempts," and a jury trial is given if demanded by the alleged offender.

Your committee are of the opinion that a failure of a witness duly served, or of a juror duly summoned, to obey the mandate of the court so nearly and immediately affects and obstructs the due administration of justice that such offenses ought to be classed with direct contempts and summarily dealt with by the court or judge having jurisdiction. If a reasonably good excuse is offered no punishment will follow, but if the failure is inexcusable a jury trial would cause delay, expense, and seriously impede the administration of justice. Contumacious witnesses and jurors should not be permitted to delay the proceedings of a court.

The proposed substitute carefully guards the rights of the accused and gives ample opportunity to present to the court written evidence purging himself of the alleged contempt.

The Senate bill, while granting a jury trial in all cases of alleged "indirect contempts" (those not committed in the presence of the court or judge at chambers),

failed to point out a procedure and seemingly left the trial for a future day and possibly in another court. No provision was made for obtaining a jury in case no jury was present, and hence great and serious delays might occur.

Your committee think it wise that when a jury trial is demanded specific power shall be vested in the court to speedily obtain a jury and proceed to the trial of the alleged contempt. No injustice can be done the accused. Preliminary proofs are required; process must issue and the alleged offender be brought before the court or judge; a written accusation must then be made and filed; an answer is permitted, and a day is then fixed for the hearing. When the jury is obtained the trial is to proceed as in a criminal case and upon evidence produced as in criminal cases, and the accused must be confronted with the witnesses against him. The manner of selecting the jury is pointed out and peremptory challenges provided for.

These provisions, necessary for the reason that the proceeding is new, can not result in injustice to the accused, for he is provided with every safeguard the law throws around alleged offenders against the criminal law.

The provision of the substitute, which says that interrogatories embracing the questions of fact material to the inquiry shall be framed by the presiding judge and submitted to the jury, to be by it answered in writing, while provoking some criticism, is, in our judgment, wise and necessary.

When the evidence has been presented to the court and jury the question of contempt or no contempt will rest on the decision of the jury as to whether the accused has or has not done certain acts. It is not for the jury to say whether the order or decree of the court alleged to have been offended against is wise or unwise, lawful or unlawful. It is not for the jury to say whether the act done is forbidden by the order or decree. The court is to construe and interpret its own order, and if the act found by the jury to have been done (or omitted when the order requires the doing of an affirmative act) has been done or omitted, contrary to the provisions of the order, decree, or judgment of the court or judge, and under conditions and circumstances showing contumacious conduct, the court or judge should be permitted to determine the effect of the act or conduct complained of.

The whole bill is restrictive upon the courts and judges, and in our judgment it would be unwise to impose on the jury the task of determing the single question "guilty or not guilty" of violating the order or decree of the court. The construction of a statute is always for the court and not the jury. The construction of an unambiguous writing is always a question of law for the court, and not a question of fact for the jury. So the court making the order or decree should be permitted to construe it; the appellate courts will reverse or modify it if wrong, but while it stands as the order of the court a jury should only be called on to determine the question whether certain acts commanded or forbidden have or have not been done.

The passing of the determination of this question over to the jury is quite as far as we ought to go if we would maintain the character and dignity of our courts. When we have done this we have gone quite as far as just-minded men will ask us to go. The facts are for the jury, the law for the courts to decide. No jury cares to be burdened with questions of law, and the accused is safe only when the determination of legal propositions is left to the decision of the proper tribunal. If we go further we tread upon dangerous ground and may undermine our courts, the only true bulwarks of our liberties.

The proposed substitute has been presented to and approved by a representative of five of the principal labor organizations of the country. The language is carefully guarded and in express terms provides that the presiding judge shall pronounce judgment according to law and in accordance with the findings of the jury. The jury is made the sole arbiter of every question of fact. These findings can not be disregarded or set aside by the court. No man can be pronounced guilty except on the finding of a jury.

The bill further provides for preserving the testimony and for an appeal in all cases of indirect contempts. This is in the interest of the liberty of the citizen, and while we should be careful not to open the door to petty appeals made for delay, we should give every reasonable opportunity for the correction of errors when personal liberty is involved.

Your committee, having carefully examined the whole question, favorably report the accompanying substitute for Senate bill 2984, and recommend that the whole of Senate bill 2984 after the enacting clause be stricken out and the following inserted in lieu thereof, to wit:

"That contempts of court are divided into two classes, direct and indirect, and shall be proceeded against only as hereinafter prescribed.

"SEC. 2. That contempts committed during the sitting of the court or of a judge at chambers, in its or his presence or so near thereto as to obstruct the administration of justice, or by neglecting or refusing to obey the mandate of any lawful subpœna

to attend any court or before a judge or commissioner and testify as a witness or produce books, documents, or records, or by neglecting or refusing to obey the mandates of a lawful summons or subpœna to attend and serve as a juror in any court or authorized proceeding, are direct contempts. All others are indirect contempts.

"SEC. 3. That a direct attempt may be punished summarily without written accusation against the person arraigned, but if the court or judge at chambers shall adjudge him guilty thereof a judgment shall be entered of record in which shall be specified the conduct constituting such contempt, with a statement of whatever defense or extenuation the accused offered thereto and the sentence of the court thereon; but when the alleged contempt consists in neglecting or refusing to obey the mandates of a subpœna or summons to attend as a witness and give evidence or produce books, papers, or documents, or to attend as a juror, due proof of the lawful service of such subpœna or summons shall first be filed and the contumacious witness or juror allowed to file written proofs by affidavit denying such service or giving excuses for the neglect or failure to obey such mandates, and thereupon the court may proceed to a hearing of the alleged contempt.

"SEC. 4. That upon the return of an officer on process or an affidavit duly filed, showing any person guilty of indirect contempt, a writ of attachment or other lawful process may issue and such person be arrested and brought before the court or judge at chambers; and thereupon a written accusation setting forth succintly and clearly the facts alleged to constitute such contempt shall be filed and the accused required to answer the same, by an order which shall fix the time therefor, and also the time and place for hearing the matter; and the court or judge at chambers may, on proper showing, extend the time so as to give the accused a reasonable opportunity to purge himself of such contempt. After the answer of the accused, or if he refuse or fail to answer, the court or judge at chambers may proceed at the time so fixed to hear and determine such accusation upon such testimony as shall be produced. If the accused answer, the trial shall proceed upon testimony produced as in criminal cases, and the accused shall be entitled to be confronted with the witnesses against him; but if a trial by jury is not demanded, such trial shall be by the court without the intervention of a jury if the alleged contempt consists in the violation of an order or process of the court, or by a judge at chambers in case the alleged contempt consists in the violation of an order or lawful process granted by a judge at chambers, and upon application of the accused, a trial by jury shall be had as in any criminal case. In case an application is made for a trial by jury and the alleged offender is entitled thereto under the provisions of this act, the court or judge may impanel a jury for the trial of the question from the jurors then in attendance, or send the case to a term of the court for trial at a future day, or if no jury is in attendance the court or judge at chambers, as the case may be, may cause a sufficient number of jurors to be selected and summoned as provided by law to attend at the time and place fixed for the trial of such alleged contempt, from which panel of jurors a jury for the trial of the case shall be selected in the manner jurors are selected for the trial of misdemeanors, and the plaintiff and defendant in the proceeding shall each be entitled to three peremptory challanges, and the trial shall then proceed as in case of misdemeanor: *Provided, however*, That in each case interrogatories shall be framed by the judge presiding at the trial, which shall embrace the questions of fact material to the inquiry, and be submitted to the jury, to be by it answered in writing, and to each interrogatory the jury shall separately answer in writing, over their signatures, and in case the jury shall answer any interrogatory in the affirmative the fact therein brought in question shall be deemed established. On the findings of the jury in answer to such interrogatories the court or judge shall proceed to pronounce judgment in accordance therewith according to law. If the accused be adjudged guilty judgment shall be entered accordingly, prescribing the punishment.

"SEC. 5. That the testimony taken on the trial of any accusation of indirect contempt may be preserved by bill of exceptions, and any judgment of conviction therefor may be reviewed upon direct appeal to or by writ of error from the Supreme Court and affirmed, reversed, or modified as justice may require. Upon allowance of an appeal or writ of error execution of the judgment shall be stayed upon the giving of such bond as may be required by the court or a judge thereof, or by any justice of the Supreme Court.

"SEC. 6. That the provisions of this act shall apply to all proceedings for contempt in all courts of the United States except the Supreme Court; but this act shall not affect any proceedings for contempt pending at the time of the passage thereof."

[House Report No. 2471, part 2, Fifty-fourth Congress, second session.]

VIEWS OF THE MINORITY.

[To accompany S. 2984.]

The undersigned members of the Committee on the Judiciary, being unable to agree with the committee in its action upon the bill (S. 2984) entitled "An act in relation to contempts of courts," wish to state briefly some of the reasons for our dissent.

It is evident that legislation concerning contempts of courts is suggested by a belief that the existing law or practice upon the subject is such that there is need of improvement. What, then, is the supposed defect?

Are the Federal tribunals wanting in power to punish for contempts of court? Or is legislation demanded or desirable to correct abuse in the exercise by some of these tribunals of ample powers already possessed by them?

There is but one answer—neither reason nor excuse for legislation "in relation to contempts of courts" can be found, except upon the theory of an abuse by some of the courts of the power which all of them have in large measure to punish summarily such contempts.

Then there should be no legislation at all upon this subject, or there should be legislation to circumscribe the powers or reform the practice of the courts and strengthen the safeguards of the citizen.

Viewed thus, we believe the amendment, by way of substitute, proposed by the committee should be rejected, and the Senate bill should be passed.

The committee have included in the classification of what are called "direct contempts" failure or refusal to obey a subpœna for witnesses or a summons for jurors. If such failure or refusal amounts to a "direct" contempt, it is not easy to perceive how or why a failure or refusal to obey any other lawful command of a court, whether affirmative or negative, is an indirect and not a direct contempt of court.

But it is urged that a contempt committed in failing or refusing to obey a subpœna for witnesses or a summons for jurors should be punished summarily, as direct contempts are punished. Direct contempts, according to the Senate bill, are "contempts committed during the sitting of the court or of a judge at chambers, in its or his presence or so near thereto as to obstruct the administration of justice."

About this definition is a degree of accuracy which must commend it to the favorable consideration of lawyers, while the committee's enlargement of this definition into that which they offer as constituting direct contempts may, perhaps, be regarded by legal lexicographers as a novelty.

It is submitted that such contempts as lie in disregard of a subpœna or summons may, and in practice would, be dealt with summarily under the Senate bill if it were law. For instance, there would be no trial if the person charged with being guilty of such a contempt should admit that he neglected or refused to render obedience to the command of the subpœna or summons. In such case the "written accusation" mentioned in the Senate bill and in the committee substitute could be confined within the limits of a single short sentence. There would never be a trial upon a plea of guilty. Besides, a few words inserted in the Senate bill, by way of amendment, would directly, in terms, provide for the summary punishment of such indirect contempts as direct contempts, properly so called, may be punished.

The object of the Senate bill is to afford persons charged with indirect contempts a trial by jury, as in criminal cases. The effect of the committee substitute, if enacted into law, would be to give the accused the form of a jury trial, with the substance withdrawn. For, instead of accepting the plan of the real jury trial, as embodied in the Senate bill, the committee provide for the submission to the jury of interrogatories, prepared by the court, and to be answered by the jury in writing. Upon the answers the court will determine the guilt or innocence of the accused. About the question of guilt or innocence the jury, according to the committee, shall have nothing to say. That shall be determined by the court, which is to continue to be not only judge and jury, but accuser as well.

Believing that the citizen should be better protected in his rights in proceedings for alleged contempts of court, and believing also that additional protection for him is to be found in real and not mock jury trials, we oppose the recommendation of the committee, and favor the passage of the Senate bill. For while that bill might be improved by amendment in furtherance of its object and not against it, we are of opinion that unless the House pass the Senate bill as it is there will be no legislation upon the subject by the present Congress.

If, however, the committee substitute is to be passed instead of the Senate bill, there should surely be taken out of it the provision for interrogatories to the jury and special findings by the jury, and it should be clearly provided that the verdict of the jury shall be "guilty" or "not guilty;" nothing more, nothing less.

The bills now before the committee which suggest the regulation of trials in contempt cases are as follows:

[H. R. 13578, Sixty-second Congress, first session.]

(By Mr. CLAYTON.)

A BILL To define and punish contempts of court.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That contempts of courts are divided into two classes, direct contempts and indirect contempts, as hereinafter defined, and shall be proceeded against as hereinafter prescribed and not otherwise.

SEC. 2. Direct contempts are—

(a) Contempts committed during the sitting of the court or of a judge at chambers, in the presence of the court or in the presence of the judge at chambers, or so near thereto as to obstruct the administration of justice;

(b) The failure or refusal to obey the mandate of a lawful subpœna to attend any court or before a judge or a commissioner and testify as a witness, or to produce books, documents, writings, papers, or records;

(c) The failure or refusal to obey the mandate of a lawful summons to attend and serve as a juror in any court;

(d) The misbehavior of any of the officers of the court in their official transactions, or the disobedience or resistance by any such officer to any lawful writ, process, order, rule, decree, or command of said court or judge at chambers.

All other contempts are indirect contempts.

SEC. 3. That a direct contempt may be punished summarily, without written accusation against the person arraigned for such direct contempt. If the accused person shall be adjudged guilty of a direct contempt, judgment accordingly shall be entered of record, in which shall be set forth the conduct constituting such contempt, with a statement of the defense or extenuation which the accused offered to the charge of such direct contempt and the sentence of the court in the case.

SEC. 4. That upon return of a proper officer on lawful process, or upon affidavit duly filed, showing any person guilty of an indirect contempt, appropriate and lawful process may issue for the arrest of such person, and such person shall be brought before the court. Thereupon a written accusation, setting forth succinctly and clearly the facts alleged to constitute such indirect contempt, shall be filed, and the accused shall be required to answer the same by an order which shall fix the time for such answer, and which shall also fix the time and place for the trial of the case. The court may, on a proper showing, extend the time so as to afford the accused reasonable opportunity to purge himself of such contempt. Before the trial, and until final determination of the case, the accused shall be admitted to bail. If the accused has failed or refused to answer, the court may proceed at the time fixed for the trial of such case to hear and determine such accusation, and upon such evidence as shall be produced. If the accused has answered, the trial shall proceed upon evidence produced as in a criminal case, and the accused shall be entitled to have and examine witnesses in his own behalf. Such trial shall be by the court, unless the accused person shall demand a trial by jury, and in case of such demand a trial by jury shall be had as in a criminal case. If the accused shall be found guilty, judgment shall be entered accordingly, prescribing the punishment.

SEC. 5. That the evidence taken on the trial of any person accused of indirect contempt may be preserved by bill of exceptions, and any judgment of conviction in a case of indirect contempt may be reviewed upon appeal, or by writ of error, as now provided by law in criminal cases, and may be affirmed, reversed, or modified, as justice may require. Whenever an appeal is taken or a writ of error granted, execution of the judgment shall be stayed, and the accused person shall be admitted to bail in such sum as may be required by the court, or by a United States judge, or by the Chief Justice or an Associate Justice of the Supreme Court of the United States.

SEC. 6. That the provisions of this act shall apply to all proceedings for contempt in all courts of the United States except the Supreme Court: *Provided*, That this act shall not affect any contempt proceedings pending at the time of the passage of this act.

[H. R. 9, Sixty-second Congress, first session.]

(By Mr. BARTLETT.)

A BILL To regulate the trial of contempts of courts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That contempts of court are divided into two classes, direct and indirect, and shall be proceeded against only as hereinafter described.

SEC. 2. That contempts committed during the sitting of the court or of a judge at chambers, in its or his presence, or so near thereto as to obstruct the administration of justice, are direct contempts. All others are indirect contempts.

SEC. 3. That a direct contempt may be punished summarily without written accusation against the person arraigned, but if the court shall adjudge him guilty thereof, a judgment shall be entered of record, in which shall be specified the conduct constituting such contempt, with a statement of whatever defense or extenuation the accused offered thereto, and the sentence of the court thereon. But in all other cases of contempt of court than those provided for in this section the accused shall have the right of trial by jury, and upon his demand to be tried by a jury a trial by jury shall be had as in a criminal case.

SEC. 4. That upon the return of an officer on process, or an affidavit duly filed, showing any person guilty of indirect contempt, a writ of attachment or other lawful process may issue and such person be arrested and brought before the court; and thereupon a written accusation setting forth succinctly and clearly the facts alleged to constitute such contempt shall be filed and the accused required to answer the same by an order which shall fix the time therefor and also the time and place for hearing the matter; and the court may, on proper showing, extend the time so as to give the accused a reasonable opportunity to purge himself of such contempt. But pending the trial, and until the final trial and termination of the case, the accused shall be admitted to bail in such sum as the court may direct. After the answer of the accused, or if he refuse or fail to answer, the court may proceed at the time so fixed to hear and determine such accusation upon such testimony as shall be produced. If the accused answer, the trial shall proceed upon testimony produced as in criminal cases, and the accused shall be entitled to be confronted with the witnesses against him. A trial by jury shall be had as in any criminal case, unless the accused shall, in writing, waive a jury, and in that case such trial shall be by the court. If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment.

SEC. 5. That the testimony taken on the trial of any accusation of indirect contempt may be preserved by bill of exceptions, and any judgment of conviction therefor may be reviewed upon direct appeal to or by writ of error from the Supreme Court, and affirmed, reversed, or modified, as justice may require. Upon allowance of an appeal or writ of error, execution of the judgment shall be stayed upon the giving of such bond as may be required by the court or a judge thereof, or by any justice of the Supreme Court.

SEC. 6. That the provisions of this act shall apply to all proceedings for contempt in all courts of the United States except the Supreme Court.

[H. R. 1617, Sixty-second Congress, first session.]

(By Mr. EDWARDS.)

A BILL To provide for a trial by jury of persons charged with contempt of court.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person accused of violating or disobeying, when not in the actual presence or hearing of the court, or judge sitting as such, any order of injunction or restraint of any nature, made or entered by any court or judge of any of the United States courts, shall, before penalty or punishment is imposed, be entitled to a trial by jury as to the guilt or innocence of the accused. In no case in any such courts shall a penalty or punishment be imposed for any contempt until an opportunity to be heard is given.

SEC. 2. That all acts or laws or parts of acts or laws in any wise conflicting with the provisions of this act are hereby repealed.

SEC. 3. That this act shall take effect and be in force from and after its passage.

[H. R. 1720, Sixty-second Congress, first session.]

(By Mr. STANLEY.)

A BILL Relating to punishment for contempt in Federal courts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That contempts of court are divided into two classes, direct and indirect, and shall be proceeded against only as herein provided.

SEC. 2. That contempts committed during the sitting of the court, or of a judge in chambers, in its or his presence, or so near thereto as to obstruct the administration of justice, or by failing or refusing to obey the mandate of any lawful subpœna to attend any court, or before any judge or commissioner, and testify as a witness, or produce books, documents, or records, or for refusing to obey the mandate of a lawful summons or subpœna to attend and serve as a juror in any court or authorized proceeding, are direct contempts. All other contempts are indirect.

SEC. 3. That a direct contempt may be punished summarily, without written accusation. Whenever any person shall be adjudged guilty of a direct contempt, the judge or court so finding shall enter of record the acts constituting the alleged contempt, and a statement of the extenuation or defense offered, if any. No person shall be adjudged guilty of any contempt for failure to appear as a witness or produce books, papers, or documents, or to attend as a juror until after the subpœna with the return of the duly authorized officer thereon and proof of lawful service shall have been filed. The contumacious witness shall be allowed to make proof denying such service or showing inability to obey said process, and such proof may be made by written affidavit. After proof heard the court may proceed to a hearing of the alleged contempt: *Provided further*, That no punishment to exceed thirty hours' imprisonment or a fine of two hundred dollars shall be inflicted for any direct contempt except failure to attend as a witness or produce books, papers, and documents, without the empaneling of a jury, upon the demand of the person accused of the alleged contempt, in which event the trial of said cause shall be conducted as in cases of indirect contempt, as hereinafter provided.

SEC. 4. That upon the return of an officer on process or an affidavit duly filed, showing any person guilty of indirect contempt, a writ of attachment or other lawful process may issue and such person arrested and brought before the court or judge in chambers; and thereupon a written accusation setting forth succinctly and clearly the facts alleged to constitute such contempt shall be filed, and the accused required to answer the same, by an order which shall fix the time therefor, and also the time and place for hearing the matter; and the court or judge in chambers may, on proper showing, extend the time so as to give the accused a reasonable opportunity to purge himself of such contempt. After the answer of the accused, or if he refuse or fail to answer, the court or judge in chambers may proceed at the time so fixed to hear and determine such accusation upon such testimony as shall be produced. If the accused answer, the trial shall proceed upon testimony produced as in criminal cases, and the accused shall be entitled to be confronted with the witnesses against him; but if a trial by jury is not demanded, such trial shall be by the court without the intervention of a jury, if the alleged contempt consists in the violation of an order or process granted by a judge in chambers, and upon application of the accused a trial by jury shall be had as in any criminal case. In case an application is made for a trial by jury, and the alleged offender is entitled thereto under the provisions of this act, the court or judge may empanel a jury for the trial of the question from the jurors then in attendance, or send the case to a term of the court for trial for a future day, or if no jury is in attendance the court or judge in chambers, as the case may be, may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place fixed for the trial of such alleged contempt, from which panel jurors for the trial of the case shall be selected in the manner jurors are selected for the trial of misdemeanors, except that plaintiff and defendant in the proceeding shall each be entitled to five peremptory challenges, and the trial shall then proceed as in the case of misdemeanors. If the accused be adjudged guilty, judgment shall be entered accordingly, prescribing the punishment.

SEC. 5. That the testimony taken on the trial of any accusation of indirect contempt may be preserved by bill of exceptions, and any judgment of conviction therefor may be reviewed upon direct appeal to or by writ of error from the Supreme Court, and affirmed, reversed, or modified, as justice may require.

Whenever it shall appear from an affidavit made by the person charged with an indirect contempt that he or she is insolvent and without the means necessary to the prosecution of an appeal, then such appeal shall be taken "in forma pauperis," and the officer of the court whose duty it is to make a transcript of the record in such cases shall be paid therefor the fees allowed by law by the United States. Upon

allowance of an appeal or writ of error execution of judgment shall be stayed upon the giving of such bond as may be required by the court or a judge thereof, or by any justice of the Supreme Court.

SEC. 6. That no agreement, combination, or contract by or between two or more persons to do or to procure to be done, or not to do or to procure to be done, any act in contemplation or furtherance of any trade dispute between employers and employees, shall be deemed criminal, nor shall any alleged conspiracy predicated upon such agreement constitute an offense, nor shall such agreement or contract be considered in restraint of trade or commerce, nor shall any restraining order or injunction be issued with relation thereto, nor shall any such agreement, contract, or combination be forbidden by any Federal court or judge or constitute any contempt of court, unless the act concerning which said contract, confederation, or agreement was made would be a crime if committed by one person.

SEC. 7. That the provisions of this act shall apply to all proceedings for contempt in all courts of the United States except the Supreme Court; but this act shall not affect any proceedings for contempt pending at the time of the passage thereof.

[H. R. 1722, Sixty-second Congress, first session.]

(By Mr. STANLEY.)

A BILL Relating to punishment for contempt in Federal courts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That contempts of court are divided into two classes, direct and indirect, and shall be proceeded against only as herein provided.

SEC. 2. That contempt committed during the sitting of the court, or of a judge in chambers, in its or his presence, or so near thereto as to obstruct the administration of justice, or by failing or refusing to obey the mandate of any lawful subpœna to to attend any court, or before any judge or commissioner, and testify as a witness, or produce books, documents, or records, or for refusing to obey the mandate of a lawful summons or subpœna to attend and serve as a juror in any court or authorized proceeding, are direct contempts. All other contempts are indirect.

SEC. 3. That a direct contempt may be punished summarily, without written accusation. Whenever any person shall be adjudged guilty of a direct contempt, the judge or court so finding shall enter of record the acts constituting the alleged contempt, and a statement of the extenuation or defense offered, if any. No person shall be adjudged guilty of any contempt for failure to appear as a witness or produce books, papers, or documents, or to attend as a juror until after the subpœna with the return of the duly authorized officer thereon and proof of lawful service shall have been filed. The contumacious witness shall be allowed to make proof denying such service, or showing inability to obey said process, and such proof may be made by written affidavit. After proof heard the court may proceed to a hearing of the alleged contempt: *Provided further*, That no punishment to exceed thirty hours' imprisonment or a fine of two hundred dollars shall be inflicted for any direct contempt except failure to attend as a witness or produce books, papers, and documents, without the empaneling of a jury, upon the demand of the person accused of the alleged contempt, in which event the trial of said cause shall be conducted as in cases of indirect contempt, as hereinafter provided.

SEC. 4. That upon the return of an officer on process or an affidavit duly filed, showing any person guilty of indirect contempt, a writ of attachment or other lawful process may issue and such person arrested and brought before the court or judge in chambers; and thereupon a written accusation, setting forth succinctly and clearly the facts alleged to constitute such contempt shall be filed, and the accused required to answer the same, by an order which shall fix the time therefor, and also the time and place for hearing the matter; and the court or judge in chambers may, on proper showing, extend the time so as to give the accused a reasonable opportunity to purge himself of such contempt. After the answer of the accused, or if he refuse or fail to answer, the court or judge in chambers may proceed at the time so fixed to hear and determine such accusation upon such testimony as shall be produced. If the accused answer, the trial shall proceed upon testimony produced as in criminal cases, and the accused shall be entitled to be confronted with the witnesses against him; but if a trial by jury is not demanded, such trial shall be by the court without the intervention of a jury, if the alleged contempt consists in the violation of an order or process granted by a judge in chambers, and upon application of the accused a trial by jury shall be had as in any criminal case. In case an application is made for a trial by jury, and the alleged offender is entitled thereto under the provisions of this act, the court or judge may empanel a jury for the trial of the question from the jurors then in attendance, or send

the case to a term of the court for trial for a future day, or if no jury is in attendance the court or judge in chambers, as the case may be, may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place fixed for the trial of such alleged contempt, from which panel of jurors for the trial of the case shall be selected in the manner jurors are selected for the trial of misdemeanors, except that plaintiff and defendant in the proceeding shall each be entitled to five peremptory challenges, and the trial shall then proceed as in the case of misdemeanors. If the accused be adjudged guilty, judgment shall be entered accordingly, prescribing the punishment.

SEC. 5. That the testimony taken on the trial of an accusation of indirect contempt may be preserved by bill of exceptions, and any judgment of conviction therefor may be reviewed upon direct appeal to or by writ of error from the Supreme Court, and affirmed, reversed, or modified, as justice may require.

Whenever it shall appear from an affidavit made by the person charged with an indirect contempt that he or she is insolvent and without the means necessary to the prosecution of an appeal, then such appeal shall be taken "in forma pauperis," and the officer of the court whose duty it is to make a transcript of the record in such cases shall be paid therefor the fees allowed by law by the United States. Upon allowance of an appeal or writ of error execution of judgment shall be stayed upon the giving of such bond as may be required by the court or a judge thereof, or by any justice of the Supreme Court.

SEC. 6. That no agreement, combination, or contract by or between two or more persons to do or to procure to be done, or not to do or to procure to be done, any act in contemplation or furtherance of any trade dispute between employers and employees, shall be deemed criminal, nor shall any alleged conspiracy predicated upon such agreement constitute an offense, nor shall such agreement or contract be considered in restraint of trade or commerce, nor shall any restraining order or injunction be issued with relation thereto, nor shall any such agreement, contract, or combination be forbidden by any Federal court or judge or constitute any contempt of court, unless the act concerning which said contract, confederation, or agreement was made would be a crime if committed by one person.

SEC. 7. That the provisions of this act shall apply to all proceedings for contempt in all courts of the United States except the Supreme Court; but this act shall not affect any proceedings for contempt pending at the time of the passage thereof.

[H. R. 4422, Sixty-second Congress, first session.]

(By Mr. KENDALL.)

A BILL To regulate the trial of cases of contempt.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all proceedings for the punishment of contempts not committed in the immediate presence of the court or judge, or in such close proximity thereto as to interfere with the regular and orderly administration of justice, the accused shall be entitled, if he so demand, to a trial by jury as in ordinary criminal cases.

SEC. 2. That before any process shall issue in such case a written information shall be filed, stating in detail the exact facts or circumstances complained of as constituting the alleged contempt. Thereupon a warrant shall issue and the accused shall be brought before the court, where he shall be advised of the precise nature of the charge against him and be allowed reasonable time and opportunity to make preparation for trial. He may answer, setting forth such defense or extenuation as he may have, and if the same be deemed sufficient, he may be discharged. If such defense or extenuation be deemed insufficient, or if he fail to answer, the trial shall proceed in all respects as in ordinary criminal cases.

[H. R. 4688, Sixty-second Congress, first session.]

(By Mr. HENRY of Texas.)

A BILL In relation to contempts of court.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That contempts of court committed during the sitting of the court, or of a judge at chambers, in its or his presence or so near thereto as to obstruct the administration of justice, are direct contempts. All others are indirect contempts.

SEC. 2. That a direct contempt may be punished summarily without written

accusation against the person arraigned, but if the court shall adjudge him guilty thereof a judgment shall be entered of record in which shall be specified the conduct constituting such contempt, with a statement of whatever defense or extenuation the accused offered thereto and the sentence of the court thereon.

SEC. 3. That upon the return of an officer on process or an affidavit duly filed, showing any person guilty of indirect contempt, a writ of attachment or other lawful process may issue and such person be arrested and brought before the court; and thereupon a written accusation, setting forth clearly and succinctly the facts alleged to constitute such contempt, shall be filed and the accused required to answer the same, by an order which shall fix the time therefor, and also the time and place for hearing the matter; and the court may, on proper showing, extend the time so as to give the accused a reasonable opportunity to purge himself of such contempt. After the answer of the accused, or if he refuse or fail to answer, the court may proceed at the time so fixed to hear and determine such accusation upon such testimony as shall be produced. If the accused answers, the trial shall proceed upon testimony produced as in criminal cases, and the accused shall be entitled to be confronted with the witnesses against him; but such trial shall be by the court, or, upon application of the accused, a trial by jury shall be had as in any criminal case. If the accused be found guilty, judgment should be entered accordingly, prescribing the punishment.

SEC. 4. That the testimony taken on the trial of any accusation of indirect contempt may be preserved by bill of exceptions, and any judgment of conviction therefor may be reviewed upon direct appeal to, or by writ of error from, the Supreme Court, and affirmed, reversed, or modified, as justice may require. Upon allowance of an appeal or writ of error, execution of the judgment shall be stayed, upon the giving of such bond as may be required by the court or a judge thereof, or by any justice of the Supreme Court.

SEC. 5. That the provisions of this act shall apply to all proceedings for contempt in all courts of the United States except the Supreme Court.

[H. R. 5605, Sixty-second Congress, first session.]

(By Mr. THOMAS.)

A BILL To determine the jurisdiction of United States courts in matters of contempt, and to regulate the trial and punishment of same.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no court or judge of any United States court shall, for contempt committed in the presence of the court, impose upon the offender a fine exceeding fifty dollars, or imprison him exceeding five days, without the intervention of a jury, if demanded by the accused, but such trial shall be by the court; or upon application of the accused a trial by jury shall be had as in any criminal case.

SEC. 2. That no court or judge of any United States court shall, for contempt committed not in the presence of the court, impose upon the offender any fine or imprisonment without the intervention of a jury if demanded by the accused, but such trial shall be by the court; or upon application of the accused a trial by jury shall be had as in any criminal case; and in all trials by jury arising under this act the truth of the matter may be given in evidence.

SEC. 3. That no court or judge of any United States court shall proceed by process of contempt or impose a fine against or imprison any person who shall by words or writing animadvert upon, comment on, or criticize, or examine into the proceedings or conduct of such court or judge by words spoken or writing published not in the presence of such court or judge in the courthouse during the sitting of court; but nothing herein shall be construed to prevent any court or judge thereof from proceeding by indictment against any person writing or publishing a libel or slanderous words of and concerning such court or judge in relation to his judicial conduct in court.

SEC. 4. That if upon a trial by jury under this act the accused be found guilty he shall be fined in any sum not exceeding five hundred dollars or imprisoned any length of time not exceeding six months, in the discretion of the court. If a jury trial be not demanded by the accused he may be fined by the court in any sum not exceeding five hundred dollars or imprisoned any length of time not exceeding six months, in the discretion of the court.

SEC. 5. That the provisions of this act shall not apply to the Supreme Court of the United States.

SEC. 6. That all laws and parts of laws inconsistent with this act are hereby repealed.

SEC. 7. That this act shall take effect and be in force from and after its passage.

[H. R. 9435, Sixty-second Congress, first session.]

(By Mr. KENDALL.)

A BILL To regulate the issuance of injunctions and to provide for a trial by jury in proceedings for the punishment of contempts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no restraining order or injunction shall be issued by any court of the United States, or the judge thereof, in any dispute between an employer and employees, or between employees, or between persons employed and persons seeking employment, or involving the terms or conditions of employment, unless such restraining order or injunction shall be clearly necessary to prevent such irreparable injury to property or property rights as can not be adequately redressed at law, and then only after reasonable previous written notice of the application therefor shall have been served upon the person or persons sought to be restrained or enjoined and he or they shall have opportunity to appear in person or with attorney and traverse the allegations of said application. In all such cases the application for restraining order or injunction shall be in writing, duly verified, and shall state explicitly the facts upon which relief is demanded, including a description of the property or property rights involved.

SEC. 2. That no agreement between two or more persons to do or not to do any act or thing with reference to any dispute between an employer and employees, or between employees, or between persons employed and persons seeking employment, or involving the terms or conditions of employment, shall be held to constitute a conspiracy unless the act or thing agreed to be done or not to be done would be unlawful on the part of a single individual; nor shall the entering into or carrying out of any such agreement be restrained or enjoined unless such act or thing agreed to be done or not to be done would be subject to be restrained or enjoined on the part of a single individual.

SEC. 3. That before any process shall issue in a proceeding for the punishment of any contempt not committed in the immediate presence of the court or judge, or in such close proximity thereto as to interfere with the regular and orderly administration of justice, a written information shall be filed stating in detail the particular facts or circumstances complained of as constituting the alleged contempt. Thereupon a warrant shall issue and the accused shall be presented before the court, where he shall be advised of the precise nature of the charge against him and be allowed reasonable time and opportunity to make preparation for trial. Unless he enter a plea of guilty, the trial shall proceed before a jury in all respects as in ordinary criminal cases.

Mr. STERLING. Do I understand that the Senate passed the Hill bill?

The CHAIRMAN. Yes, the Hill bill passed the Senate, with the amendment I have mentioned, on June 10, 1896.

Mr. STERLING. But it was not acted on in the House?

The CHAIRMAN. It came to the House and was not acted on in the House, but was reported from the committee by Mr. Ray, who, in his report, offered the Ray bill as a substitute.

Mr. NORRIS. Referring to the compilation you have on the statutes on contempt, you have only one copy of it, I presume?

The CHAIRMAN. It is simply a typewritten document.

Mr. NORRIS. I was going to suggest, as it appears to be a valuable document, it might be well to have it printed.

The CHAIRMAN. I think it may be of some value and the suggestion to print it in connection with the hearing will, without objection, be adopted.

Mr. FLOYD. Does the compilation referred to include only the existing laws of the different States on the subject of contempt, or a history of such laws?

The CHAIRMAN. It only includes the statutes as they now stand. It would probably make it too long if we undertook to run down the history of contempt legislation in each State. We only want to know what the State law on the subject of contempt is to-day.

Mr. FLOYD. As I understand it, your statement includes all the Federal statutes on the subject from the beginning and only the existing State statutes?

The CHAIRMAN. Yes. I thought it was proper for the committee to have all the United States statutes as a part of the history of legislation on this subject by Congress, and I thought that perhaps I could aid the committee by suggesting what States have statutes on this subject and what they are. Now, for instance, in this matter of jury trial in indirect contempt cases, it is true, as Mr. Thomas of Kentucky, will tell you, that wherever in Kentucky a fine of more than $30 is imposed the man has a right to a jury trial. In the State of Kansas there is substantially a division of contempts into direct and indirect contempts, and in some cases a jury trial. Where a man is ordered to pay over money in the State of Georgia he is entitled to a jury trial. In Colorado, in certain cases, he is entitled to a trial by jury when charged with contempt, and in Oklahoma he is entitled to a jury trial in certain cases. West Virginia provides for a jury trial in certain cases of contempt. The object of referring to the Hill bill, the Ray substitute, and to State statutes was to show that in certain cases of contempts of court the right of trial by jury is not a novel suggestion.

Mr. THOMAS You can not fine a man over $30 or put him in jail over six hours without a jury trial in Kentucky.

Mr. HENRY. How long has that law been in operation?

Mr. THOMAS. Ever since I can remember.

The CHAIRMAN. I was going to say that when these hearings are printed I shall embody, unless there is objection, the preliminary statement I have made, and I shall also embody in the publication the Federal statutes and these State statutes on the subject of contempt, so that the hearings and this other matter may be printed in convenient form if it is the wish of the committee to do it.

Mr. THOMAS. Let me tell you another thing that happened in the United States court in Kentucky before Judge Cox. He fined and imprisoned several men for violating an injunction that they had never heard of. No process of any kind had ever been served on them. The judge stated that it was a general order of the court and supposed that they had heard of it. He stuck them in jail; and right down in my district now they have several men up for contempt who are not parties to the bill of complaint, and upon whom no process of any kind or character has been served. They have had no process of any kind or character served upon them; it seems to me that such proceedings ought to be regulated.

Mr. NYE. Is there not some gentleman present who wishes to be heard on this subject?

The CHAIRMAN. Yes.

Mr. NYE. Well, it seems to me that we ought to take this matter up in order.

The CHAIRMAN. We will hear from Mr. Ralston first, if that be the pleasure of the committee. I will say for the benefit of the committee that Mr. Ralston appeared before the Committee on the Judiciary of the House in March, 1900, I think it was, and gave his views on a measure which, I believe, was somewhat cognate to this. Having been a member of the committee at that time and having heard Mr. Ralston, I took the liberty the other day of informing him that

we would have this hearing, and that if it would be convenient for him to come before the committee I would be glad for him to do so. In response to that invitation he is here this morning. Mr. Ralston, please give the reporter your full name and address.

STATEMENT OF MR. JACKSON H. RALSTON, BOND BUILDING, WASHINGTON, D. C.

Mr. RALSTON. Mr. Chairman, as you have stated, I appear before the committee to-day at the suggestion and request of the chairman. I am glad that the chairman made that statement, because I do not want it understood for a moment that I am appearing now in my capacity as an attorney in any particular case, because it happens to be my fortune to have been identified with one contempt case that has been very prominent in the public eye.

The CHAIRMAN. That was not in my mind at the time. I simply recalled that you had once appeared before the Committee on the Judiciary and addressed them on this subject.

Mr. RALSTON. But I wanted to make that disclaimer on my own account.

Mr. CARLIN. The case you have referred to is the Gompers contempt case, is it not?

Mr. RALSTON. Yes, sir; and in whatever I have to say, therefore, I do not want to be considered as expressing the views or ideas of my clients, with whom I have had no consultation, with reference to the bill pending before the committee. If I may go directly to the bill, and certain phases of it that appealed to me in reading it over, I will say that there are, I think, many good ideas embodied in the bill; but, if the chairman will pardon me, it seems to me that the bill does not completely cover the subject, and that it is a subject which ought not to be treated by piecemeal. Of course, at the present time our national legislation upon the subject is entirely deficient. I say entirely deficient, although there is section 725 of the Revised Statutes, but I believe that is all there is on the subject in the way of legislation. Now, the first thing which occurred to me in looking over the bill was this, that contempts of court are divided into two classes, direct and indirect contempts. Now, that does not complete the entire nomenclature, because we have now very well defined by the Supreme Court—and it was done in the recent presentation, or, rather, as the result of the presentation of what is known as the Gompers case—as I say, we have now very well defined by the Supreme Court the difference between civil and criminal contempt. Now, indirect contempt may be of either one of these two classes—that is, either civil or criminal—and it might very well be the case that the procedure which would be appropriate for a civil contempt would be entirely inappropriate and improper for what is known as a criminal contempt. I may say in brief that the purpose of the civil contempt is regarded as remedial to the parties bringing the contempt before the court by claiming to have been directly injured by the violation of the order of the court, whereas criminal contempt pertains more largely to conduct having criminal characteristics. It is regarded as a direct insult to the court, and interferes directly with the powers of the court as such.

The CHAIRMAN. Let me ask you right there this question: The party charged with an indirect contempt, of course, is to get a jury trial, and under this bill that object is accomplished, is it not?

Mr. RALSTON. Yes, sir; I think that at least is accomplished by this bill, but the procedure to be taken in the two classes of contempt is different. As I say, a civil contempt is a remedy for the benefit of the persons injured and a criminal contempt is an outrage committed against public law. Now, that is something which enters into the nature of the punishment, as was pointed out in the case to which I have alluded. The proposed bill defines direct contempts in very much the manner that they are defined in section 725 of the Revised Statutes.

Mr. STERLING. In your discussion of the Gompers case, I believe you stated that was held to be a civil contempt?

Mr. RALSTON. I merely referred to the facts of that case. I am not expressing any opinion on it in any way.

Mr. STERLING. But I understood that that was the definition given?

Mr. RALSTON. I will say this: This position was clearly taken by the Supreme Court in that case—in brief, the decision upon this point was about to this effect: That proceeding was brought by the Bucks Stove & Range Co., charging Messrs. Gompers, Mitchell, and Morrison with having been guilty of contempt of orders of the court and praying relief against them, and also for general relief. A large amount of testimony was taken, and the Supreme Court, in considering the case, reviewed particularly the application for contempt. The petition for contempt, the nature of the remedies sought, the manner in which the testimony had been taken in the case—it was treated as if it was an ordinary equity case in the taking of the testimony—and other factors were considered, and they came to the conclusion that the proceedings which were inaugurated by the Bucks Stove & Range Co. was intended to be remedial to the company, and to restore to them something of the loss to which they were alleged to have been subjected by reason of the conduct of the respondents. When it came to the infliction of the penalty, however, Mr. Justice Wright directed the imprisonment of the respondents, and the Supreme Court said that that was a punishment which would have been entirely proper if the proceedings had been criminal in their nature—that is to say, it was not to remedy an assault, or supposed assault, upon the dignity of the court—but that, inasmuch as the intent and purpose of the Bucks Stove & Range Co.'s proceeding was to afford a remedy to that company, and such a remedy as would prevent the recurrence of similar supposed injuries, the proceeding in that case was really civil in its nature, and that Judge Wright erred when he inflicted upon the respondents a purely criminal penalty. In other words, the decision held that it was no relief to the Bucks Stove & Range Co. to say that these particular respondents should go to jail.

Mr. CARLIN. But did not the court lay down a method of procedure by which the lower court could proceed, even in that matter, and impose a penalty for criminal contempt? Did not the Supreme Court in that case arrive at a method by which the lower court could even in that very case impose a criminal penalty by a different method of procedure?

Mr. RALSTON. The Supreme Court did not discuss the matter of penalties. That refers doubtless to the penalties to be imposed in civil contempt cases, but I take it from the precedents and from some of the language of that decision that the sort of penalty which could have been imposed would be something like this: The court could have imposed a fine upon Gompers, Mitchell, and Morrison for the benefit of the Buck's Stove & Range Co., and, possibly, in default of the payment of that fine, which was to be imposed for their benefit, it could commit the respondents to jail.

Mr. NORRIS. Do you mean that the court could require them to pay the Buck's Stove & Range Co. money—that is, that the court could impose a fine, and, when it was collected, have it paid over to the complainant?

Mr. RALSTON. Yes, sir; that is the procedure which has been taken in a large number of cases.

Mr. CARLIN. Is any procedure pending now under that decision of the Supreme Court?

Mr. RALSTON. Yes, sir.

Mr. NORRIS. Would not that in effect be a method of bringing proceedings for the collection of damages which, under a more appropriate procedure, should be collected directly by a suit for damages?

Mr. RALSTON. If you are asking for my individual opinion, I will say I think so. I think my views would be very radical upon this whole question of contempt, perhaps too radical, because I think there is very little necessity for any law upon this subject at all, except for those contempts committed directly. That, however, is a personal view of my own.

Mr. THOMAS. The second section (*a*) reads as follows:

> Contempt committed during the sitting of the court or of a judge at chambers, in the presence of the court or in the presence of the judge at chambers, or so near thereto as to obstruct the administration of justice.

Do you not believe that the United States judges would construe that law to mean an obstruction to the administration of justice even in cases where the parties charged were a thousand miles distant from the court?

Mr. RALSTON. I think not.

Mr. THOMAS. I think they would, and I think they have done it in the district court in my own State.

Mr. RALSTON. If you will pardon me I will suggest that they certainly have sought to punish for contempt committed miles away. Do you understand these to be direct contempts or indirect contempts committed outside the presence of the court?

Mr. THOMAS. It might be an indirect contempt, but however far distant, they would construe it as an obstruction to justice.

Mr. RALSTON. Yes.

Mr. MOON. I do not believe that has been the case under the terms of the existing law. The whole object of this bill is to treat these direct contempts as indirect contempts. The whole theory is practically to make these direct contempts indirect contempts.

Mr. THOMAS. Why not pass a bill allowing United States judges to fine a man up to a certain extent for direct contempt without the intervention of a jury, and if they impose a greater fine, say as much as $50, then he shall have a jury trial, and then give the persons

charged a jury trial in all indirect contempts? Is not an indirect contempt a breach of the peace?

Mr. RALSTON. Yes.

Mr. THOMAS. It is simply a breach of the peace?

Mr. RALSTON. Yes.

Mr. THOMAS. Then why is not the person charged entitled to a trial by jury?

Mr. RALSTON. That brings me to what I should have said a moment ago. As I said, my own view upon the subject was crystallized; that there is absolutely, except for contempt committed in the immediate presence of the court, no statute for any special procedure whatever in contempt cases. The reason is this, that disobedience to an order of court is in its essence a crime, and is made criminal with propriety by the Revised Statutes; and, being criminal, I personally see no more reason why a contempt of court should be the subject of special procedure and special methods of trial than any other criminal offense. After all, it is nothing but a criminal offense, and the fact that it is committed before the court is not really of the essence of the offense.

Mr. THOMAS. I do not wish to trouble you, but have you read that bill of mine, No. 5605, on that subject?

Mr. RALSTON. I am sorry to say that I have not had that pleasure.

Mr. THOMAS. I wish you would read it, and point out what objections you have to it.

Mr. RALSTON. I will be glad to have a copy of it and to go over it.

Mr. THOMAS. I wish you would go over it, and, if you have any objections to it, please point them out.

Mr. RALSTON. I shall be glad to do it.

Now, there are certain other things, and one of them has been touched upon by the gentleman who has last spoken. There are certain things in section 3 to which I want to direct the committee's attention. There is no limitation as to the punishment which may be inflicted in contempt cases, and I submit that that is a dangerous thing. I think that matters of that kind ought not to be left to the unrestrained action of the court, and that this committee, in whatever bill it may agree upon, ought to fix directly and absolutely the limitations upon the powers of the court in the matter of inflicting punishment. There is no such limitation in the statutes to-day. Doubtless the compilation of which the chairman has spoken will indicate to this committee more clearly than anything I might say what the rules are in the different States, but I will take a moment to call the attention of the committee to a few of them as gathered together in a brief that it was my fortune to prepare sometime ago. In Florida fines for contempt may not exceed $10 or imprisonment for 30 days; in Louisiana, fines are limited to $50 and imprisonment to 10 days; in New York fines may not exceed $250 and imprisonment not in excess of six months; in North Carolina, the punishment is a fine not exceeding $250 or imprisonment not exceeding 30 days; in Ohio, punishment may not be more than a fine not exceeding $500 and imprisonment not exceeding 10 days.

Mr. CARLIN. That does not apply to witnesses refusing to answer questions, does it?

Mr. RALSTON. I do not recollect any limitation in that respect.

In California, punishment may not exceed $500 and imprisonment not exceeding 5 days.

These limitations exist in the States named and in a great number of other States. I think the severest fine which has ever been imposed directly by the Supreme Court itself was in the Shipp case, and, as I remember, that was 90 days in jail, and yet punishments for contempt have been administered by the courts as high as a year, and possibly in one or two cases in excess of that time. Yet, the consensus of legislative opinion is that fines ought not to be on an average of perhaps more than 30 or 60 days' imprisonment.

Mr. McCoy. What about the case of a man who is directed by the court to do a thing which he may be able to do but which he still refuses to do?

Mr. Ralston. That raises a different state of affairs. There is quite a distinction there. That is not exactly treated by the courts as punishment, because he may go free if he will, and there have been cases of that sort, perhaps, in some of these States I have enumerated.

Mr. Graham. In such cases the court would make continuing orders.

Mr. Ralston. I think the suggestion is this, where, for instance, a man is ordered to execute a deed and declines to do it and will go to jail first. As the courts have sometimes expressed themselves, he holds the key to the jail in his own hand all the time, so that is not a fine in the strictest sense.

Mr. Norris. Your illustration could be made with a witness declining to testify. In case the court made an order directing the witness to answer certain questions, you could not relieve him there by having somebody else to do it.

Mr. Graham. If he refuses to answer the questions, the court can commit him to jail for a time, and at the end of that time, if he still refuses to answer, the court can recommit him, and by that means can keep him in jail indefinitely, but at no time would the court be inflicting more than a limited punishment.

Mr. Norris. If a limitation is put in section 3, as suggested by you, would it reach that kind of contempt?

Mr. Ralston. It would be difficult for me to answer that offhand. I am going over this very hastily, and await the pleasure of the committee.

Mr. Davis. I think that Mr. Ralston's statement ought to be allowed to proceed without interruption.

Mr. Nye. Is it the purpose of the committee to continue this session after 12 o'clock?

The Chairman. I wanted to accommodate Mr. Davenport, who is here to-day. In response to an inquiry that I received from another gentleman the other day, saying that he and Mr. Davenport wished to know whether the hearing would be public, I stated that the committee would be glad to have himself and Mr. Davenport present, and Mr. Davenport is here. He informs me that he has an important court engagement in New York to-morrow that will take him out of the city, and he would like very much to be heard to-day. Of course, we can hear Mr. Wilson at any time.

Mr. Wilson. I simply want to call attention to the fact that it is necessary for me to be on the floor of the House when it convenes,

and I ask that I be given an opportunity to be heard at some other time.

Mr. HENRY. This is a very important subject, and we should finish it up very promptly. I desire to make this sort of motion, that the bills now pending and the hearings now being had be made the special order for to-day and for all other days until we have finished the hearings and taken action on the bill.

The CHAIRMAN. You have heard the motion, that the bill now under consideration, H. R. 13578, and all other bills pertaining to the same subject, be made the continuing order for hearings to-day and to-morrow and until the hearings may be concluded and action had by the committee on the bill.

Mr. CARLIN. You do not intend by that to limit the discussion of the bill?

Mr. HENRY. No, sir; I simply want to finish up the job after we take it up.

(The motion of Mr. Henry was unanimously adopted by the committee.)

Mr. MOON. Was it your idea that immediately after the public hearings we should go into executive session for the purpose of considering the bills?

Mr. HENRY. Yes; but I do not want to shut off the hearings at all.

The CHAIRMAN. What is the pleasure of the committee? It is now 12 o'clock. What time shall we return here, or shall we remain in session longer? I understand that it is the pleasure of the committee that we proceed with the hearing at this time, and Mr. Ralston will continue his statement.

Mr. NYE. Do I understand that there is no objection?

The CHAIRMAN. The proposition is that the committee now continue this hearing and that Mr. Ralston proceed at this time with his statement. Is there any objection?

Mr. NYE. I think we ought to take a recess.

(Whereupon, at 12 o'clock noon, on motion of Mr. Nye, the committee took a recess until 2 o'clock p. m.)

AFTERNOON SESSION.

The committee met, pursuant to the taking of recess, at 2 o'clock p. m.

ARGUMENT OF DANIEL DAVENPORT, ESQ., OF BRIDGEPORT, CONN.

Mr. DAVENPORT. Mr. Ralston says he will kindly suspend his remarks and let me take the floor, so that I can get the train, if that is agreeable to the committee.

The CHAIRMAN. That is perfectly agreeable, unless I hear some objection. No objection is heard. The committee is in order, and Mr. Davenport will now proceed.

Mr. DAVENPORT. My name is Daniel Davenport. I reside in Bridgeport, Conn. If the committee please, this is a matter that is of such great importance, and that affects the profession and the courts, of course, of this great country, so generally, that I would ask, after I submit what oral suggestions I have to make, the privi-

lege of filing with the committee, before the hearings are closed, a memorandum elaborating my arguments in regard to the pending measures.

The CHAIRMAN. Mr. Davenport, permit me to ask you right there how much time you would want to do that?

Mr. DAVENPORT. I can do it in three or four days, I should suppose.

The CHAIRMAN. I might say that some of the members of the committee have indicated a desire to bring this hearing to a conclusion this week, if possible.

Mr. DAVENPORT. It seems to me, Mr. Chairman, that when the committee comes to consider the insuperable objections which lie in the way of this bill they will be desirous of all the light that anybody can throw on the general subject, providing they desire to have any legislation whatever.

The CHAIRMAN. I have no disposition to speak for the committee, because it has not taken any action on that; but I merely suggest that in view of what has been suggested to me by some members of the committee I hope you will prepare the brief, or argument, or document, or whatever you may call it, as soon as you can.

Mr. DAVENPORT. Certainly.

The CHAIRMAN. Understand me, I do not undertake to say when the committee will close the hearings.

Mr. DAVENPORT. I would request that this bill, H. R. 13578, may may be printed at the commencement of the report of my remarks.

The CHAIRMAN. That will be printed. It is already considered as printed in the hearings in the statement I have made. You just proceed as though it were in there.

Mr. DAVENPORT. My request was that it might be embodied as a part of my remarks in order that the pertinency and application of the objections I may make may be apparent.

The CHAIRMAN. It will be at the beginning of the hearings with the statement I made this morning. You will remember I said that several of these things would be printed in the preliminary statement, and you may just consider it there, there being a few intervening pages in the hearing between the printed bill and your remarks. My reason for suggesting that is that there is no reason for printing it twice in the same document. So you just assume that it is before you in your hearing, as it will be in the printed hearing.

Mr. DAVENPORT. I do not know who is the author of this bill.

The CHAIRMAN. I can answer that for you if you desire the information.

Mr. DAVENPORT. I trust that, whoever may be the author of this bill he, will not take exception to any criticisms that I feel obliged to make upon its provisions.

The CHAIRMAN. That is exactly what this hearing is for—to have criticism.

Mr. DAVENPORT. With that explanation, I direct the attention of the committee to the provisions of this bill as an opponent of it.

The first section of the bill provides as follows:

That contempts of courts are divided into two classes, direct contempts and indirect contempts, as hereinafter defined, and shall be proceeded against as hereinafter prescribed and not otherwise.

SEC. 2. Direct contempts are—

(*a*) Contempts committed during the sitting of the court or of a judge at chambers, in the presence of the court or in the presence of the judge at chambers, or so near thereto as to obstruct the administration of justice.

(*b*) The failure or refusal to obey the mandate of a lawful subpœna to attend any court or before a judge or a commissioner and testify as a witness, or to produce books, documents, writings, papers, or records.

(*c*) The failure or refusal to obey the mandate of a lawful summons to attend and serve as a juror in any court.

(*d*) The misbehavior of any of the officers of the court in their official transactions or the disobedience or resistance by any such officer to any lawful writ, process, order, rule, decree, or command of said court or judge at chambers.

All other contempts are indirect contempts.

Then section 3 provides what? That every direct contempt may be punished summarily without written accusation against the person arraigned for such direct contempt. The first criticism I make upon this bill is that that provision is manifestly unconstitutional, because it blends together those things which are in their nature essentially and fundamentally distinct, for the purpose of proceeding to their investigation and punishment.

Mr. CARLIN. What provision of the Constitution does that violate?

Mr. DAVENPORT. No person shall be deprived of liberty or property without due process of law.

The CHAIRMAN. Have not the courts always punished direct contempts without any written specifications or charges?

Mr. DAVENPORT. Not always. But, if the committee would permit me to develop what I have to say, perhaps it would obviate the necessity of asking me questions or my diverting from the argument to answer them.

The CHAIRMAN. Very well.

Mr. DAVENPORT. There are two classes of contempts in the nature of things, and so recognized by all the courts time out of mind. One is a contempt committed in the face of the court, and the other is a contempt committed outside of the scope of the senses of the judge. It is only in the case of offenses committed in the face of the court that proceedings can be taken after the manner that is outlined here in the third section, the reason being that the judge sees the offense committed, and all that a witness could do is performed by the judge himself. He sees it, and upon that knowledge he is permitted to proceed summarily and punish the contemnor. But this country as yet is not Turkey or Russia, and any attempt to pursue that course as to anything committed outside the presence of that judge would be an invasion of the fundamental rights of the citizen which no court could pursue without a violation of the fifth amendment to the Constitution. We all know that, according to the old adage, calling a tail a leg does not make it a leg. There is that essential difference between contempts, and if you should attempt to authorize the court to proceed in regard to these constructive contempts, as they are called—that is to say, contempts not committed in the face of the court—as it may proceed in contempts in the personal presence, this act would be, in that respect, void. Upon that proposition I do not suppose it is necessary for me now to cite authorities, but in the memorandum which I request the privilege of presenting to the committee you will find that proposition fully supported.

I was calling attention to the fact that, according to my contention, the division in this bill of contempts into direct contempts and

indirect contempts, and the including in the class of direct contempts both offenses committed in the face of the court, where summary action can be taken, offenses committed outside of the observation of the court, and the permitting in the latter cases summary action as in the former, would be an invasion of the rights of the contemnor, and a law in that respect would be void; and I promise to present to the committee authorities in support of that proposition.

Mr. MOON. I do not know that I exactly understand. Can you give an illustration? Do you mean to say they include something in the first section that ought not to be included, that would violate the constitutional right of the contemnor?

Mr. DAVENPORT. This bill attempts to divide contempts into what it calls direct and indirect, and under the head of "direct contempts" it includes both offenses committed in the face of the court, which the court time out of mind has been authorized to proceed with summarily, and others committed outside of the view of the judge, where such summary proceedings never have been and never can be constitutionally resorted to. You can find an excellent illustration of that and I think the authorities fully cited in Ex parte Terry, in 128 United States Reports, which you will remember was the case where an order having been made in the presence of Judge Field upon Judge Terry he resisted it and drew a pistol upon the officer, and immediately went into the adjoining room. Thereupon Judge Field proceeded at once without having Terry brought before him, to find him guilty of contempt, and sentenced him in his absence and without any hearing to six months in jail. From that sentence, or to be relieved from its effect, Terry brought a habeas corpus, and it came up before the Supreme Court, and in the opinion the court pointed out the distinction between contempts that are committed in the face of the court and all other contempts, and overruled the objection of Judge Terry's counsel that the action of the court was void, holding that summary proceedings can be taken for offenses committed in the face of the court, while they can not be taken in any others without a violation of the constitutional rights of the party. So much for that point.

Another thing that appears right on the face of this bill is one alluded to this morning by Mr. Ralston. He directed your attention to the fundamental distinction that exists between what are called "civil" contempts and "criminal" contempts, and he well illustrated the distinction. Of course, that line of cleavage runs through the whole field of jurisprudence.

Now, it is not in the power of the legislative department to require the equity courts of the United States to have the issues of fact in any proceeding in equity tried by a jury. It is not within the legislative power. They can authorize them to try the issues by a jury. They are authorized now to try them by a jury, as was stated by Mr. Justice Lamar in the opinion in the Gompers case (221 U. S.). But Congress can not compel any issue of fact in a civil proceeding in equity to be tried before a jury. Upon that proposition I promise to submit to the committee, in my memorandum, many authorities. There is no disputing it.

But just now I want to particularly direct your attention on that subject to the case of Brown *v.* The Kalamazoo Circuit Judge, to be found in 75 Michigan, beginning on page 274. I want to read now

only an extract or two. That was a case where the Legislature of Michigan undertook to require in equity cases the trial of issues of fact by a jury, and the court held the law unconstitutional, and said, among other things:

> The system of chancery jurisprudence has been developed as carefully and as judiciously as any part of the legal system, and the judicial power includes it, and always must include it. Any statute which transfers the power which belongs to a judge to a jury, or to any other person or body, is as plain a violation of the Constitution as one which should give the courts executive or legislative power vested elsewhere. The cognizance of equitable questions belongs to the judiciary as a part of the judicial power, and under our Constitution must remain vested where it has always been vested heretofore.

They refer to decisions made by the Supreme Court of the United States under the Federal Constitution. The committee must bear in mind that all proceedings in equity courts in what are called civil contempts are, as Mr. Ralston well explained it, remedial, for the benefit of the party. They are part of the main case, and Congress can no more compel the courts to have the fact of the contempt to be determined by a jury than they could in any other proceeding in the case.

Reference was made here to the famous case of the Bucks Stove & Range Co. *v.* Gompers (221 U. S.). As Mr. Ralston well explained, the court there held that that proceeding was one to punish for a civil contempt, and that, being civil, the only remedy under it which the plaintiff was entitled to was a fine imposed upon the parties who had violated the injunction; in some respects commensurate with the damage they had done the plaintiff that criminal punishment could not be inflicted in such a proceeding. To sum this all up, so far as the provisions of this bill undertake to require the trial of civil contempts in equity to be by jury, Congress would be doing a futile thing if it passed a bill for that purpose for reasons well explained in the decisions.

But there are other objections to this bill which are fundamental and insuperable, and which arise from the fact that it is not within the power of the legislature to take away the power of any court, either of law or equity, to protect its own dignity from assault and to enforce its own orders by explicitly what is called, for the sake of distinction, criminal punishment. This necessitates a brief explanation of the relation the Federal Legislature bears to the judiciary of the United States.

You will remember that the Constitution provides that the judicial power of the United States shall be vested in a Supreme Court and in such inferior courts as Congress may from time to time ordain and establish. When the legislature, acting under the provisions of that Constitution, creates a court and confers jurisdiction over any class of cases, the judicial power of the United States vests in that court, not by virtue of the legislation, but by force of the Constitution.

Now, we had up in my State a famous case which well illustrates that proposition, which case, by the way, has been cited more frequently probably than any other case in the history of jurisprudence, until its doctrines have become interwoven as a portion of the judicial fabric of this country. I refer to the case of Brown *v.* O'Connell, reported in 36 Connecticut, page 432. Let me briefly explain how

that case directly bears upon the proposition I am now explaining. Our State constitution provides that the judicial power of the State shall be vested in a supreme court of errors, a superior court, and such inferior courts as the legislature may create, the same language exactly as the language of the Federal Constitution, with the exception that we mention a superior court, the language being, "A supreme court of errors, a superior court, and such inferior courts as the legislature may create." In the case of Brown *v.* O'Connell, reported, as I say, in 36 Connecticut, 432, the court had occasion to determine whether the judicial power of the State of Connecticut vested in the police court of the city of Hartford, "an inferior court," by virtue of the charter of the city of Hartford passed by the legislature, or whether it vested in it by force of the constitution of the State; because the language of the constitution of the State was that the judicial power shall be vested in such "inferior courts" as the legislature may ordain and establish, in substance. The case is full of instruction; but I read only one sentence as containing the point of it:

> It was therefore competent for them to provide for the organization of the court in question and to define the jurisdiction it should possess, and when so constituted the judicial power of the State vested in it by force of the Constitution to the extent of the jurisdiction so defined.

I promise to lay before the committee, in the memorandum which I will submit, other cases illustrative of the proposition, to show that the distinction that is attempted sometimes to be made (and which has apparently influenced the author of this bill) between the Supreme Court of the United States—because that is mentioned by name in the Constitution—and the other courts, which are called "inferior courts," which the legislature may from time to time ordain and establish, is unfounded. This is not any longer an open question so far as the courts of the United States are concerned.

Mr. MOON. I was going to ask you what the judicial power is. What is vested in the court by the constitution when it is created?

Mr. DAVENPORT. The judicial power is the power to hear and decide and to exercise all those inherent functions which are necessary in order for it to perform and exercise its jurisdiction.

Mr. MOON. And enforce its decrees?

Mr. DAVENPORT. Absolutely. Let me say, as I was about to say, this is not any longer an open question. The Supreme Court of the United States settled that question in the Gompers case. I presume you gentlemen have all had more or less experience in contempt matters. The very first case I ever had, 36 years ago, was one in Connecticut, the case of State *v.* Middlebrook (43 Conn.), which is referred to so often in the books. They have been coming up all along ever since; and I think Mr. Ralston and I will have to consider the subject of contempt for some time to come. The power to punish for contempt is necessarily inherent in any court when it is created, and it does not need any legislative act to confer that power upon the court; neither can the legislature take away that power. It can regulate it, it can limit it, so long as it does not essentially impair the court's judicial power in the exercise of its jurisdiction. I want to just call your attention to what the Supreme Court said in this very recent case, which follows a long line of decisions. I quote now from Gompers *v.* The Buck Stove & Range Co. (221 U. S., p. 450):

For while it is sparingly to be used, yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration whose judgments and decrees would be only advisory.

If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the "judicial power of the United States" would be a mere mockery.

This power "has been uniformly held to be necessary to the protection of the court from insults and oppressions which in the ordinary exercise of its duties enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of suitors."

There has been general recognition of the fact that the courts are clothed with this power and must be authorized to exercise it without referring the issues of fact or law to another tribunal or to a jury in the same tribunal. For if there was no such authority in the first instance there would be no power to enforce its orders if they were disregarded in such independent investigation. Without authority to act promptly and independently the courts could not administer public justice or enforce the rights of private litigants.

That is also the doctrine laid down in the Debs case, in 158 United States, and the court in the Gompers case was really only adopting or using the language that had been used in that case. On that proposition I promise the committee that I will produce an abundance of authority, so far as Federal legislation is concerned.

Reference has been made here to State legislation. With commendable diligence the chairman has pursued an investigation into the legislation of the States, to see what they have done and how they have attempted to deal with these matters. Unfortunately I did not hear any reference, in the résumé which was read or referred to by him this morning, to what the courts of the States had done to these laws in regard to this matter. For instance the State of Virginia passed a statute which required the trial of contempt cases—indirect contempts, as they are called in this bill—by a jury. But the court of appeals in Carter's case in 96 Virginia—decided, by the way, after the report was made by Judge Ray, to which the chairman referred—expressly held the law to be unconstitutional because it took from the courts of the State their inherent powers, which were essential to the independence of the judiciary of the State.

I think some reference was made to the legislation of West Virginia. I know a statute was passed there very similar to the one Representative Thomas has spoken of in Kentucky, and the supreme court of West Virginia decided that it was unconstitutional in State *v.* Frew (24 W. Va.). Of course, in a broader way the same question is involved in the discussion of the power of Congress to restrict and prevent the issuance of injunctions by courts of equity, but upon these points I will not now further elaborate.

What is an indirect contempt in an equity court? It includes a violation of a temporary restraining order, a violation of a temporary injunction, and the violation of a permanent injunction. In all such cases under the provisions of this bill the accused would be entitled to a trial by jury. Now, take an instance. Suppose I have a contest with my friend here, Mr. Nye, for instance, over certain trust funds, or over the possession of certain negotiable securities, or a thousand and one things of that nature that may come up, and he comes into a Federal court of equity and asks to have his rights secured. He goes through all the processes and delays of the courts, and finally gets a permanent order, a final decree that I pay

over to him the money, or that I pay it to a receiver, or to another trustee; or that I execute a deed, or that I do any of the thousand and one things that Mr. Ralston referred to in his remarks, but I do not do it. You know how it is now. The court would call me in, and if I could not justify it I would be promptly committed to jail until I did comply. Under this bill, what is to happen? When he comes to proceed against me I would call for a jury. Of course, you must have observed the many imperfections and absurdities in this bill in regard to how such jury is to be summoned, and how the trial is to be conducted; because you understand that it is not a criminal trial in any way, and the law providing for a common-law jury has no application at all to a jury in an equity court. Mr. Nye would have to go to work and try his case all over again in order to compel me to do that which, in the original decree, I had been ordered to do.

But I want to call the committee's attention to the very disastrous effect such a bill would have on the great trust litigation the country is having. After the Government, with infinite pains and innumerable delays, at last gets a final decree in such a case and the court undertakes to enforce that decree if this bill passes, how is it to be done? These men who are guilty under the decree can be brought into court now; if they do not obey, to jail they go. If this proposed change is made and the court undertakes to enforce its decree, the first thing it must do is to have a jury trial, with all the possibilities of adverse verdicts, disagreements, bribing of jurors, delays, and all such things that may occur in the course of it. I would like to develop these things orally further, but I am pressed for time. But I do say that I will endeavor to file a memorandum for the use of the committee.

Mr. MOON. Let me ask you a question there. Take the Standard Oil decree, and suppose the parties in interest refuse to obey; they would be entitled to a jury trial.

Mr. DAVENPORT. Certainly.

Mr. MOON. I would like your opinion as to whether the merits of the original question could not be entered into?

Mr. DAVENPORT. Probably.

Mr. MOON. Is it not true that the rule of law is that a contempt order must have been one that was judicially and properly made?

Mr. DAVENPORT. Certainly; so far as it is jurisdictional.

Mr. MOON. And one which the court had a right to make. Would it not open up the whole question?

Mr. DAVENPORT. Whether the decree was within the jurisdiction of the court. We fought that all out, Mr. Ralston and I, in the Gompers matter. To see how impotent the court would be in matters of this kind, take a case I was speaking of to Judge Moon, that has come up now in the Circuit Court of the Southern District of New York, where we are endeavoring to have certain gentlemen punished for the violation of an injunction. On the 31st of December the Circuit Court of the United States for the Southern District of New York will cease to exist, and who is going to punish the violators of the injunction thereafter for previous offenses against the dignity of the court? The court then dies. It has no enemies to punish nor friends to reward thereafter. It ceases to be. It will be as dead as Julius Cæsar thereafter, and no other court can be authorized to proceed to try the questions as to the offense against

the dignity of the Circuit Court of the United States for the Southern District of New York. Why? The Supreme Court says so in Gompers's case. It is utterly impossible to transfer from one court to another the determination of the question whether there has been any affront to the dignity of that court. And, in the same way, it says you can not transfer the trial of the question to a jury in the same tribunal.

Thanking the committee for the opportunity, and Mr. Ralston for permitting the interruption, and if the committee does not care to ask any questions, I would ask to be excused.

Mr. NYE. Under this law, suppose they went on in the trust cases, for instance, to enforce the decree and the jury was called. Has the judge any power to direct that jury, or even instruct, and make his instructions binding?

Mr. DAVENPORT. No. At present, you know, when a jury is resorted to in equity, as the court has said over and over again, the court can set aside everything the jury does in its verdict. It is advisory what a jury does in an equity case in a United States court.

Mr. CARLIN. If I catch the force of your argument, it is that the power to punish for contempt is an inherent power in the court, and there can not be legislation in regard thereto, or it can not be regulated or controlled.

Mr. DAVENPORT. I say it may be regulated, but not so as to substantially impair its effectiveness.

Mr. MOON. That is, it can not be regulated to the extent of taking away from the court the power to enforce its decrees by summary proceedings.

Mr. DAVENPORT. Certainly not.

Mr. MOON. Justice Field, in interpreting the act of 1831, which did regulate it, affirmed that power of the court, did he not?

Mr. DAVENPORT. Yes.

Mr. MOON. I have his language here:

> The power to punish for contempts is inherent in all courts; its existence is essential to the promotion of order in judicial proceedings and to the enforcements of judgments, orders, and writs of the courts.

In every other respect it is to regulate.

Mr. CARLIN. It is very easy to dismiss an important matter with a statement of that sort. But let us see the test of that statement. What would you consider a regulation of the power of a court to punish for contempt that would not impair the free will of the court to do as it pleased?

Mr. DAVENPORT. I will give an illustration. Take the bill cited, I think by Mr. Thomas, which requires a trial by jury in cases where the punishment exceeds $10 fine. How much effect would that have—a fine of $10—on a trust magnate? It would be a mockery of the court. Such a law as that mentioned by him is on its face, and the Supreme Court of West Virginia so says, if I recollect it right, absolutely making a mockery of the court's order. I should say that probably a limit could be fixed that in ordinary cases would be held not to be crippling to the court. Another suggestion was made by Mr. Ralston this morning.

Mr. CARLIN. Permit me just a minute, while you are on that one subject of regulation. Suppose, on the other hand, that for a mere petty offense committed in the presence of the court itself, in the face

of the court, as you have suggested, the court should imprison a man for 10 years?

Mr. DAVENPORT. That very situation has been met.

Mr. CARLIN. If there were no power anywhere to regulate that discretion of the court, the court could just as well make it 10 years as 10 days or 10 minutes.

Mr. DAVENPORT. The Supreme Court of the United States has held that cruel and unusual punishments of that character are prohibited by the Constitution. There is a limit to which the court can go.

Mr. NYE. The abuse of the discretion.

Mr DAVENPORT. Certainly. Our friends contended, in the Gompers case, that the sentence there was unparalleled in length and so void as unusual and cruel. But we had only to turn to the case In re Savin (131 U. S., 267), where a sentence for a year was inflicted in a contempt case, which the Supreme Court of the United States sustained. That was an attempt to bribe a witness near the court. We found also several sentences by Judge Brewer of ten, eight, and six months in contempt cases for violation of injunctions.

Mr. MCCOY. Judge Davenport, do you not conceive that the object of this bill is to do away with the trial merely of an issue of fact on affidavits, and to submit the question of fact to the jury, and in no way impede the court in imposing such punishment as it shall deem proper, if the fact of the violation is found to exist?

Mr. DAVENPORT. Suppose the jury finds that the violation did not occur or that it should disagree; what becomes then of the power of the court? The trial of cases by affidavits—those are not permitted.

Mr. MCCOY. Taking a concrete case, suppose there is a case of picketing, as we know that word in labor disputes. A man is accused on affidavits of having violated an order of the court against picketing. Do you conceive that the dignity of the court, or its inherent powers, would be in any way impinged if that man denied he had been picketing, that he had been at that specific place at the time when the offense was alleged to have occurred, and he was given an opportunity of having that mere issue of fact tried by the jury? It would not involve the making of the decree; I mean, the question of fact as to whether the decree was made would not be involved or whether the court had jurisdiction to make the decree; but that sole fact would be the one that would be in issue, would it not?

Mr. DAVENPORT. Yes; and the court is dependent, then, upon the finding of the jury.

Mr. MCCOY. In the other case it is dependent on affidavits made by some witnesses.

Mr. DAVENPORT. Not affidavits. You do not try cases by affidavit. That is one of the points settled in the Gompers case, the right of a contemnor to have his case tried by witnesses who give their testimony in court, or the equivalent of it. Affidavits will not go.

But before I leave I want to refer to one matter which Mr. Ralston spoke of this morning. He says many offenses are made criminal by statute, and that that dispenses, if I understood him, with the necessity exercised by court of the power to punish for contempt. Suppose your honors, in the exercise of your legitimate power, should make it a criminal offense for a person to spit in the face of a judge, a misdemeanor, or even a felony. Would that deprive the court of the power then and there to punish him for the contempt of court?

This committee should not fail to remember that it is only by form of speech that we speak of criminal and civil contempt. There are no crimes against the United States except those that are created and defined by statute. That was held long ago in the case of United States *v.* Hudson, in 7 Cranch. There can not be found an offense against the sovereignty of the United States unless it is defined in some statute, created by some statute. In that very case they distinguish between the inherent power of the court to punish for contempts and the exercise of criminal jurisdiction by that court.

Mr. CARLIN. Mr. Davenport, in line with the question asked you by Judge Moon just now as to what the powers were conferred on the courts by statutes, I call your attention to section 725 of the Revised Statutes of the United States. It says:

> The said courts shall have power to administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the courts, contempts of their authority: *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice.

Mr. DAVENPORT. Read those further provisions.

Mr. CARLIN (reading):

> The misbehavior of any of the officers of said courts in their official transaction, and the disobedience or resistance of any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts.

Is not that an empowering statute?

Mr. DAVENPORT. No.

Mr. CARLIN. Does not that limit the authority of the courts?

Mr. DAVENPORT. It is a limit of power, and, as has been repeatedly pointed out by the judges, not only of the United States but of the State courts, every single essential power of the court is carefully preserved in that statute.

Mr. CARLIN. Under your contention, would not the existing statute be unconstitutional?

Mr. DAVENPORT. No, it would not. It might be unconstitutional in some extreme instances, but, as has often been pointed out, there is not a single act which it is essential for the court to have power to punish in order to secure its dignity and administer justice that is not covered by it. You know the history of that proviso. The original statute did not have it in, and you will remember that about 1820 arose the impeachment case of United States District Judge Peck of Missouri. Judge Peck had published his decision of a case in the newspapers, and the lawyer on the unsuccessful side thereupon very severely criticized his decision in the same paper. Thereupon Judge Peck pulled him into court and proceeded to punish him for contempt. He sent him to jail, I believe, for a day or two and disbarred him from practicing as an attorney for a certain period. The gentleman followed the judge up for several years and finally secured impeachment proceedings by this House, and the judge was tried before the Senate for his acts. James Buchanan, the predecessor of our distinguished chairman, was then chairman of this committee, and was also the leading manager of the House in the impeachment proceedings. Conviction was not secured. Thereupon Mr. Buchanan reported from this committee the law as it stands to-day.

The CHAIRMAN. Approved March 2, 1831, and not in the year 1820.

Mr. DAVENPORT. The impeachment failed along in February, I think.

Mr. MOON. That bill as reported and passed contained more than that. It contained a criminal provision, which, by the act of 1874, was carried into the criminal code. The act of 1831 was broader than that.

Mr. DAVENPORT. What was the effect of that decision? It cut off such performances as Judge Peck was guilty of, all of which had been brought out in the famous arguments on one side or the other in the impeachment case; it being contended on one side that there was no limit whatever to the power of a judge to punish for such a contempt. On the other hand, it was claimed that there was a limitation, that is, to punish for publication in newspapers, and that he had exceeded his power, which was an impeachable offense. Mr. Webster and some other distinguished Senators in the Senate voted for his acquittal. He was not convicted. But suppose this case: Suppose a case is pending in a United States court, and I am a party to it, and, for the purpose of influencing the course of the trial when it comes on, I cause to be printed in the newspapers something that brings into disrepute my antagonist. I do it for the purpose, by circulation of that in the community, of prejudicing my opponent's case. A question was asked here this morning if an offense committed a thousand miles away might not be held to be so near as to obstruct the administration of justice. That very case arose over in Philadelphia—Judge Moon perhaps will recall it—where Justice Baldwin held that he was powerless, in view of this decision, to protect the litigants in his court; and that decision is reported. But that has long since been set aside. Those words "or so near as to obstruct the administration of justice," as was pointed out, are very flexible. It depends on the circumstances.

How much time would it be convenient for the committee to give me to prepare this memorandum?

The CHAIRMAN. Do you think you could do it in the next three or four days?

Mr. DAVENPORT. I think I can. I thank the committee.

ARGUMENT OF JACKSON H. RALSTON—Continued.

Mr. RALSTON. There are one or two considerations which have suggested themselves to me by virtue of the argument of Mr. Davenport. Mr. Davenport suggested, in response to a question from Mr. Carlin, that an extraordinary sentence in a contempt case, one for 10 years, for instance, would be such a cruel and unusual punishment that it would be regarded as unconstitutional. I was compelled to give some consideration to that question in connection with the Gompers case, and while, in my brief, particularly in the lower court, I collated a number of authorities, some of which were referred to this morning, as to the length of punishment permitted in contempt cases, I was not able to find any case which would justify the suggestion of Mr. Davenport, although I should have been very glad at the time to have had his assistance. I thought, at the time the sentence was imposed, it was perhaps so long as to constitute cruel and unusual punishment, and that we might avail ourselves of that pro-

vision of the Constitution. But the language of the court is different. The cruelty and unusual character of the punishment does not relate to the length of imprisonment given; it has no relation whatever to that, and we were compelled in that case—I found myself as a lawyer compelled—to rely upon the matter as an abuse, as we contended, at least, of judicial discretion, and it was from that standpoint only that we argued it before the court. I think, therefore, Mr. Davenport's suggestion does not meet the question raised by Mr. Carlin.

The suggestion was also made that affidavits were not used in these contempt proceedings. It is fair to say that affidavits have been repeatedly used, and I think my recollection is very much at fault—and I will be glad to have Mr. Davenport correct me if I am wrong about it—if affidavits were not used to decide the Phelan case, which is one of the most celebrated, as we know. Certainly they have been used in very many contempt cases, and it is utterly improper, as I think we must all concede, that the great issue of liberty, which sometimes involves in itself even life, should be left to the determination of affidavits and to the respective skill of lawyers on one side or the other in preparing affidavits or the facility with which witnesses, who are not subjected to cross-examination, will sign them.

Mr. DAVENPORT. Will you permit a suggestion?

Mr. RALSTON. Yes.

Mr. DAVENPORT. I understand that the Gompers case emphatically decides that such a thing as that can not be done. It is true that where a party has not insisted on his rights affidavits have been used. But in criminal contempts, as we call them, the constitutional right of a party to a cross-examination of the witnesses against him can not be denied.

As to the other matter, as to the length of punishment, we have these cases. It is true that unless there is abuse of discretion the court could not set them aside. But if there is an abuse of discretion, they can. And the instance that was cited by Mr. Carlin is a perfect one. On that subject of cruel punishment you have but to turn to a very recent decision by the Supreme Court of the United States, where, for an apparently trifling offense, they imposed a very long term of punishment, in a case from the Philippines. Mr. Ralston is undoubtedly familiar with that. (Weems *v.* United States, 217 U. S., 349.)

Mr. CARLIN. That is under statute, though, not a contempt.

Mr. DAVENPORT. Not contempt; but whether it was cruel and unusual punishment to punish a man too severely for an apparently trivial offense.

The CHAIRMAN. Mr. Davenport, before you go I want to ask you one thing, inasmuch as you have made reference to Mr. Thomas's bill, H. R. 5605. I would like to know whether in that reference to it you intend the committee to understand you approve the remedies, I may say, or the plan suggested by that bill?

Mr. DAVENPORT. No; I do not. I have not examined it.

The CHAIRMAN. Then I would ask you to consider that bill in making this brief.

Mr. DAVENPORT. Will you furnish me with all these contempt bills?

The CHAIRMAN. Each one. Judge Bartlett introduced a bill that is almost a copy of what is known as the Hill bill, to which I referred this morning. Mr. Henry, of Texas, introduced a bill on the same line. Mr. Stanley introduced two bills on the same line. Mr.

Edwards, of Georgia, introduced a very short bill on the subject of contempt. Mr. Kendall, of Iowa, introduced a bill on the same subject. I will have the clerk furnish you with copies of all the bills, and you will understand now that while the discussion has been mainly on this bill, H. R. 13578, the committee has all of these bills on this subject before it, and will consider them all at the same time. I say that in order that you may have the benefit of that suggestion when you come to make this written argument or brief.

Mr. DAVENPORT. Let me call attention right there to the distinction between the Hill bill, the Ray bill, and this bill. Senator Hill, in his bill, avoided the difficulty which I pointed out when I first began. He made direct contempts only those which occurred in the presence of the court. Mr. Ray, in his substitute, which never came to anything, included what are clearly constructive contempts in the class of direct contempts, or contempts in the face of the court. He put them all on the same basis. Mr. Hill's bill obviates the first objection that I made; but in avoiding Scylla he runs it to Charybdis. I thank the committee for that suggestion.

You will remember that Judge De Armond and his fellow Democrats on the committee most vigorously protested against Mr. Ray's bill.

The CHAIRMAN. I remember very well, and they put it on the ground, if you will read Mr. De Armond's minority report, that Judge Ray's bill provided too much machinery, interrogatories to be propounded, etc., and went too much into detail.

Mr. DAVENPORT. You can quote that, and you can also quote other things in the report.

(Mr. Ralston resumed his argument.)

Mr. RALSTON. Mr. Chairman, Mr. McCoy was about to ask me a question.

Mr. MCCOY. I was just going to ask whether it is not a question, in regard to using affidavits in these matters, with the judge, if he chooses to supplement the affidavit by calling the parties before him and taking testimony; but that he is under no compulsion to do so?

Mr. RALSTON. The practice, I may say, is, I think, undergoing a change as nearly as you can figure out from the confusion that attaches to the matter of procedure and practice in this relation. The old practice was, for instance, that if the contempt was denied under oath by the respondent, the respondent went free, subject only perhaps to the penalties of perjury. Then there has been a practice sometimes of examining him on interrogatories, and the Supreme Court has recognized that he might submit to interrogatories if he saw fit, with an indication that he had a right to be heard in person in some way.

Mr. MOON. Mr. Ralston, I have before me the Phelan case, and I find in that case, which was heard before Judge Taft, it is perfectly apparent it was tried on affidavits, because the Judge says:

> On Thursday, July 5, the motion of the receiver for Phelan commitment came on to be heard, and a week has since been taken up in the giving of testimony and argument.

The whole case was tried absolutely on testimony given in open court.

Mr. STERLING. Suppose it was the universal practice to try on affidavits; that could be easily remedied by statute without taking away the power of the court.

Mr. RALSTON. I think so, absolutely.

Mr. STERLING. It would not be necessary to have a trial by jury in order to avoid affidavits.

Mr. MOON. I understand the Supreme Court has said it can be tried that way.

Mr. STERLING. I am assuming it can be.

Mr. RALSTON. That may be an inference from the Gompers case; but of course that was not a question involved directly in the Gompers case, as it went to the Supreme Court.

Mr. CARLIN. I would like to have you direct some portion of your remarks to the constitutionality of the bill.

Mr. RALSTON. I have not felt myself that there could be any question of the constitutionality of this bill as drawn. As drawn it relates to a question of penalty. But perhaps my attitude toward it may be influenced by a general attitude toward the whole subject, and this may not be very legal. I do not present it as such. It does seem to me that intrinsically there is no difference between the violation of the orders of the courts, the violation of a law of Congress, or a violation of an authorized direction of the President. The President may not summarily try people who violate orders which he is authorized to give and to which a penalty as a crime is attached. Congress may not summarily send people to jail on charges of contempt, but Congress refers it to the regular judicial criminal branch. So, I think, as a matter of clear reason—I do not advance it as anything further than that—the courts ought not to have a power over and beyond that possessed by coordinate branches of the Government.

The only argument, on the other hand, that I know of is the argument of convenience; a very unsafe argument to indulge in when questions of liberty are concerned. I think all questions ought to be solved in favor of the utmost perfection of individual liberty. I myself have the utmost sympathy with the main object to be gained by the bill.

The CHAIRMAN. Right in that connection I call your attention to the case of Ex parte Robinson (19 Wall., 505, 510) and read you this extract, which is quoted with approval by the Supreme Court in the case of Bessette *v.* W. P. Conkey Co. (194 U. S., p. 327). The quotation is this:

> The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject they became possessed of this power. But the power has been limited and defined by the act of Congress of March 2, 1831. The act, in terms, applies to all courts; whether it can be held to limit the authority of the Supreme court, which derives its existence and powers from the Constitution, may, perhaps, be a matter of doubt. But that it applies to the circuit and district courts there can be no question. These courts were created by acts of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted.

Do you think that is the law?

Mr. RALSTON. I have no doubt of it.

Mr. MOON. I would like to call the chairman's attention to the fact that the judge was construing the act of 1831, and he reaffirms, at the very beginning of that, that the moment the courts are created the judicial power is vested in them; and he affirms what the judicial power is that can not be taken away. The act of 1831 did not attempt to touch that judicial power.

The CHAIRMAN. This language is used:

> Their powers and duties depend npon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted.

Mr. MOON. It is perfectly apparent from reading the opinion that from his first definition, in which he says that there is a power above the legislature, the moment a court comes into existence it is vested with judicial power, and in the enumeration of that judicial power that can not be affected is the power to enforce its rules.

Mr. THOMAS. Do you hold that the court is above Congress, that created it?

Mr. MOON. Unquestionably, in certain respects. You would not suppose Congress could tell a court how it should decide a case?

Mr. THOMAS. I would suppose it could limit its power.

Mr. MOON. Not to enforce its own decrees?

Mr. CARLIN. You are contending that the court has certain constitutional powers, and this would be one of them that Congress could not regulate by statute. Now comes in the decision and says that, so far as these courts are concerned, they are dependent upon the statute entirely, and we can make the statute what we please.

Mr. MOON. You do not read the decision right.

Mr. CARLIN. That is my understanding of it. We have created that court. We could make the limitation then; we could do it now. We can abolish that court, if we see fit.

Mr. RALSTON. Now, Mr. Chairman, referring to the particular question to which the committee is now addressing itself, I call its attention to the fact that that very act of 1831 did away with a power of contempt which was theretofore claimed by at least one court; and to that extent it was an invasion, if you will, a repudiation, at least, of a claimed judicial power before that time, so that if I correctly read the very act, by cutting off part of the claimed powers of contempt of court, it went further than the act pending before this committee, which relates to the administration of a power which it is admitted has to remain within the court.

There were two or three other matters to which I invite the attention of the committee. The matter of limitation of punishment may not, I think, be too strongly urged. That is covered from one point of view, and a very excellent point of view, in Mr. Thomas's bill. But I think there is extreme danger of abuse of judicial discretion in cases of this kind on the part of the court. Theoretically a contempt is a disobedience of a certain impalpable thing, something we may not put our hands upon, the law. But in point of fact it is a violation of the commands of a human being, although clothed in form of law; and it is very, very difficult for that human being to try a case of contempt without the personal feeling entering into it, and the difficulty is not removed when the question is sent to one of his associates, who is very likely, in a greater or less degree, to share either the indi-

vidual feeling of the judge whose orders have been violated, or the general feeling of the bench that whatever proceeds from the bench is sanctified itself. So that the work of the jury in breaking the force of those feelings is one of the very greatest possible importance, and of the greatest possible public advantage.

Mr. CARLIN. You seem to be willing to have interruptions, and for that reason I am trying to get from you light upon the doubt in the minds of some of us about this.

Mr. RALSTON. Anything I could say, I should be very glad to say.

Mr. CARLIN. I will ask you this question: The trouble I am having to reach a conclusion is that I think I see a difference between a statute which would limit the power of the court itself and a statute transferring from the court to another tribunal, such as a jury, a power which belongs to the court. There is the difficulty. I have no doubt we could say to the court itself: "You shall not proceed any further," with such limitations with reference to contempt. "You shall proceed in such and such a way." But the question is whether, transferring now to a jury the right of trial of a question of fact as to whether there is a contempt, is depriving the court of an inherent power.

Mr. RALSTON. If I may say so, my way of dealing with the matter would be to allow courts to deal summarily with what are termed direct contempts, which are committed within their presence. In so doing they act, to all intents and purposes, as conservators of the peace. When they come to indirect contempts, however, which are committed far and away, generally, beyond the presence of the court, I think those ought to be made criminal cases and proceeded with as criminal. But that is not quite answering your question. I see no reason why a new procedure or new method of procedure may not be introduced here, if it be a new method of procedure. I do not think it is more than that, because if I understand the purpose of the bill, which I have read with more haste than I should like, it is to obtain the sense of the jury upon the facts of the case; rather of an advisory nature, is it not, than conclusive?

Mr. CARLIN. That is the legal question raised, whether it is transferring the power of the court to the jury.

Mr. RALSTON. We have that very condition prevailing, as we know, in equity, where issues of fact are repeatedly sent by the court to a jury to advise the court as to its opinion under the circumstances.

Mr. MOON. Is it not true that no law can compel that?

Mr. RALSTON. It is true that it is not compelled by law.

Mr. MOON. It has been true that all laws attempting to compel it have been held unconstitutional, has it not?

Mr. RALSTON. I am not prepared to answer that.

Mr. MOON. The court acts of its own volition?

Mr. RALSTON. The court acts of its own volition.

Mr. THOMAS. Has a United States circuit court any such thing as an inherent power?

Mr. RALSTON. I am not prepared on all questions of constitutional law to-day; but I should think it had no power except such as was conferred upon it.

Mr. THOMAS. Is not all the power of these courts conferred upon them by act of Congress?

Mr. RALSTON. That is correct.

Mr. THOMAS. And is it not the fact that they have no inherent power whatever?

Mr. RALSTON. That is my impression.

Mr. MOON. You would not say that, would you, Mr. Ralston, that the judicial power is not invested in them by their creation?

Mr. RALSTON. That the court only has such powers as Congress could confer upon it.

Mr. MOON. Could Congress say to a court that it should decide a case in such and such a way?

Mr. RALSTON. Oh, no.

Mr. MOON. Then there is no power beyond the judicial power.

Mr. RALSTON. But it can say, "You shall pass on such and such a class of cases and not on others."

Mr. MOON. It has inherent judicial power that no power can take away.

Mr. THOMAS. I contend that these courts have no power of any character, inherent or otherwise, except what is conferred upon them by the act of Congress creating them. What do you think about that?

Mr. RALSTON. I think that is true, except as to the Supreme Court of the United States.

Mr. THOMAS. I am not talking about the Supreme Court of the United States. Of course, that has constitutional powers, you know.

Mr. RALSTON. There is one matter, which, if you will pardon me, I think creates a difficulty which does not exist to-day. It is provided here that a warrant may issue, or what is equivalent to it, for the arrest of the person accused, who, under certain conditions, as to giving bond, may be admitted to bail. Considering we are dealing with a court of equity and not a criminal court, I think that is hostile to the rights of the citizen. The ordinary proceeding in contempt cases, as I understand it, to-day is that the court upon showing being made to it issues a rule to show cause, and the attempt is made on the part of the respondent to show cause. But until the action of the court the respondent is under no obligation to furnish any security whatsoever. Under this provision men who are ultimately found innocent of any attempt or any desire to infringe the orders of the court may be held in jail for months, where to-day they go free.

Mr. DAVIS. In practice does not an attachment frequently issue before the service of the rule?

Mr. RALSTON. Not frequently. I would not say it is not so in some jurisdictions, but I speak with entire correctness when I say that the practice in all United States courts is as I say; that is to say, the rule to show cause issues first and the return is had, and then the trial is had. Sometimes, I am very confident, although I was mistaken in the Phelan case, it is held on affidavit; in other cases it has been had upon a hearing before the court, and so on. But in the Federal courts, I think without exception, there is no attempt to hold a man to bail until there has been a finding of guilt. So that this provision in the statute is a provision against liberty rather than in favor of it.

Mr. STERLING. You mean in the bill?

Mr. RALSTON. In the bill. I say it is a provision against liberty rather than in favor of it, imposing a harsh and unusual restriction, which I respectfully submit ought not to exist.

Mr. NORRIS. What means would be obtained, unless that or some similar provision were provided, to insure the presence of the party?

Mr. RALSTON. Ordinarily, at least, there is no difficulty to-day. Men can be traced up if there is a pending criminal proceeding. Of course, a man may go anywhere until he is indicted and then brought in, and then there is an official prima facie showing of guilt.

Mr. NORRIS. In this case there would be a prima facie showing, would there not? There would be a charge made here, the same as a charge made against a man who is alleged to have committed a crime?

Mr. RALSTON. Yes; but made under quite different obligation of sanctity and protection for liberty, because the charges in these contempt cases are not ordinarily made by an officer of the Government, not presented to a grand jury by an officer of the Government, not passed upon, in the first instance, by people who have any opportunity of sifting the evidence. But I think, in point of fact, the difficulty suggested has never arisen. I have never heard of its arising. Men, as a rule, have certainly sufficient confidence in the strength of their case to stand their trial. I have never heard of a person failing to answer.

Mr. NORRIS. A man who would be apt to fail would be the man who was likely guilty, and the man who ought to be punished; he would be the man more likely to escape.

Mr. RALSTON. I can only say I know of no such case. They have always stood their ground, and if they did not, they would be subject afterwards, anyway, to indictment.

There is another point which seems to me of importance, and I ought not to close this hearing, which has taken much more of your time than I expected, without referring to it. I suppose I ought to make the explanation that this particular point has been brought before me quite forcibly because of proceedings pending in the district court here. Thequestion I want to suggest to the committee is that as to the statute of limitations. In my view of the case, after having given it as careful study as I knew how as a lawyer, it has seemed to me that the existing statute of limitations applies to contempt cases; that contempts were made a crime by section 725; and in support of that particular view, the view that they were made a crime, I would refer the committee to a rather interesting case in 117 Federal Reporter, 184, Castner et al. *v.* Pocahontas Collieries Co. et al.

Mr. CARLIN. Was that a misdemeanor or a felony?

Mr. RALSTON. Treated as a misdemeanor.

The CHAIRMAN. Right in that connection, in order to make the reference that you just quoted correct and bring it up to date, section 725, I would ask that the reporter put down that section 725 is now embraced in section 268 of the act codifying and amending the laws relating to the judiciary approved March 3, 1911.

Mr. MOON. It does not go into force until the 1st of January.

The CHAIRMAN. That is true.

Mr. RALSTON. I submit that the case in question shows that contempt is a crime against the United States, and as such punishable by indictment. We have, of course, our statute of limitations

applying to all crimes, and the question is whether, by virtue of the old section 725, contempt of court is such a crime as that the statute of limitations runs against it. Based upon one case in the State of Illinois and another case in the State of Kentucky, I have thought, and have had occasion to contend, that the statute of limitations did directly apply to cases of contempt.

Mr. THOMAS. What Kentucky case is that?

Mr. STERLING. Are you going to file your brief with the committee?

Mr. RALSTON. I had not thought to file a brief, but these are some notes I had. Gordon *v.* Commonwealth (133 Southwestern, 206) is the Kentucky case, and the Illinois case is Beattie *v.* People (33 Ill. App., 651).

I was going to say that those are the only two cases I know of that directly, and, as I say, specifically, apply to this subject. But it is proper for me to add that upon the argument of that question before a justice of this city a couple of weeks ago he decided against me. I therefore think, very frankly, that there is no reason why a statute of limitations which will apply to offenses of the very gravest possible character should not by your act be made to apply to questions of contempt, which are very often of the most trivial character.

Mr. CARLIN. You suggest that this be amended to make that apply?

Mr. RALSTON. To cover that specific point. Of course, I am not asking that it cover pending actions. I would have no right to do it, and you gentlemen ought not to do it.

Mr. MOON. We could not do it.

Mr. RALSTON. We have to stand our chances as to pending actions. But I think it ought to be put beyond all question for the future, that contempt is simply an offense as any other offense, and to be treated like any other.

Mr. MOON. Did not the Supreme Court, in the Savin case, decide it was not an offense?

Mr. RALSTON. I think not.

Mr. MOON. Did it not arise in this way? He was sentenced for six months, and did he not attempt to take advantage of the parole law, which gave him 30 days, and did it not come before the court, and did not the court say it is not an offense against the United States, and he was not entitled to commutation?

Mr. RALSTON. I do not recall; you may be right. But in a very large number of cases, including this last case of Mr. Gompers, the Supreme Court speaks of cases of contempt as being criminal in their nature.

Mr. MOON. They always speak of it that way, because they are such cases as can not be classified in any other way.

Mr. CARLIN. They are not proceeding by indictment, are they?

Mr. RALSTON No; they are not proceeding by indictment.

Mr. CARLIN. How are they proceeding now?

Mr. RALSTON. They are proceeding now in a rather unusual way, but I think a legally correct way; in form, at least. I think there are other defects, which I need not mention. A committee of three were appointed by the court to report to the court whether there was reasonable ground to believe that a contempt had been committed.

Mr. CARLIN. That is a jury of three, practically?

Mr. RALSTON. It was a grand jury, if you will.

Mr. CARLIN. To find the fact?

Mr. RALSTON. To find and determine and report to the court whether there was reasonable ground to think a contempt had been committed. The committee of three, which consisted of the three lawyers who had been opposing Mr. Gompers, reported to the court that there was reasonable ground to think that he, Mitchell, and Morrison had been guilty of contempt. Thereupon a rule to show cause was issued against the three respondents, and served upon them.

Mr. CARLIN. Is there any statute, or rule, or practice, confining the court to three?

Mr. RALSTON. No.

Mr. CARLIN. It could have had twelve?

Mr. RALSTON. There is no rule of practice governing or controlling it in the slightest degree. It has been a practice which has been resorted to on some few occasions. It was resorted to a few months ago in Cincinnati, in a case where, I think, Mr. Cox was charged with contempt of court. The judge referred the matter to a committee of three, to report whether there was reasonable ground to think he, or whoever it was, had been guilty of contempt; and they did, and that same procedure was followed, as it happened, in this particular case, and has been followed in prior cases.

Mr. STERLING. If a petition, sworn to, was filed, making a prima facie case, would the court enter a rule to show whether or not contempt had been committed?

Mr. RALSTON. Yes.

Mr. STERLING. Is not that the customary practice?

Mr. RALSTON. That is more nearly the customary practice than the appointment of a committee to make an investigation.

Mr. CARLIN. In principle what is the difference between the appointment of a committee to ascertain a given state of facts and impaneling a jury to ascertain them?

Mr. RALSTON. I confess I am not able to draw the line, as a matter of practice.

Mr. FLOYD. One precedes. The trial of the jury would come after the charge was made. It would be more in the nature of a grand jury.

Mr. NORRIS. The jury has to try the issue already made up, and this committee has to fix the issue.

Mr. CARLIN. The jury merely ascertains whether the contempt has been committed after the appointment of this committee, as I understand it from Mr. Ralston; they simply ascertain and report to the court whether there is reasonable ground to believe a contempt has been committed.

Mr. RALSTON. Yes.

Mr. NORRIS. But Mr. Gompers is not heard before this committee. It is like a grand jury. It is an ex parte proceeding.

Mr. MOON. Apparently a substitution for the petition?

Mr. NORRIS. Yes.

Mr. RALSTON. Except, of course, the petitioner expresses his own belief, and the court puts its judicial confidence in the three men who make the report to it.

Mr. CARLIN. At the suggestion of some members of the committee we think we see a similarity between the present proceeding and what is contemplated by this bill, except in one instance you call it a committee, and in this bill we call it a jury. How does the committee

proceed to ascertain the fact as to whether there is reasonable ground to believe that a contempt has been committed?

Mr. RALSTON. I can only answer that question—I presume I can answer it—by a reasonable surmise in the present case. The committee consisted of the three lawyers who had fought the contempt case on behalf of the Bucks Stove & Range Co. up to the Supreme Court, and they merely had before them the record of the case, and perhaps some outside knowledge on their part; that is as good an answer as I can make.

Mr. CARLIN. They did not examine witnesses?

Mr. RALSTON. Naturally, I was not in their confidence, and they did not examine witnesses. There was no hearing, of course, at all on behalf of the respondents in the determination of that question. The only knowledge of theirs was that a newspaper announcement had been made of their appointment, and afterwards, in due course, the service of the rule to show cause, with a copy of the report.

Mr. FLOYD. What are the names of the three lawyers who constituted that committee?

Mr. RALSTON. Mr. Davenport, who has appeared before this committee, Mr. J. J. Darlington, and Mr. James M. Beck.

Mr. STERLING. Do you think there is a tendency in the courts to abuse this power to punish for contempt?

Mr. RALSTON. I do not know that I would put it quite that way. To say there is a tendency implies that they are more apt to do it to-day than they have been in the past. I would not be able to say that. I think the judge is always exposed to a temptation to abuse. I think that is inherent in human nature and no law can get way from it, because personal feeling enters into it in so many cases.

Now, Mr. Chairman, I have detained you too long.

Mr. THOMAS. Mr. Ralston, I wish to ask you this question: Do you believe that the Supreme Court of the United States has any power or authority except that conferred upon it by Congress?

Mr. RALSTON. The Supreme Court of the United States?

Mr. THOMAS. The Supreme Court.

Mr. RALSTON. Yes; I think so.

Mr. THOMAS. Where does it get it?

Mr. RALSTON. The Supreme Court is given power to pass upon certain classes of cases.

Mr. THOMAS. Where does it get the power?

Mr. RALSTON. By the Constitution. It has jurisdiction of disputes between States, and ambassadors——

Mr. THOMAS. Yes: ambassadors, ans such as that. That is defined by the Constitution.

Mr. RALSTON. Yes.

Mr. THOMAS. It has original jurisdiction, has it not?

Mr. RALSTON. Yes.

Mr. THOMAS. Could not the Congress of the United States limit the power of the Supreme Court to punish for contempts?

Mr. RALSTON. I would not like to give an offhand answer to that question. It is one I have never given any proper consideration to.

Mr. THOMAS. If they can not do it, why can they not do it? Is there anything in the Constitution that forbids it?

Mr. RALSTON. There is nothing that, offhand, occurs to me; but I would not like to commit myself by any conclusive answer.

Mr. CARLIN. Suppose a court, following the precedent in Washington, were to select a committee of four gentlemen to ascertain and report to the court whether there was reasonable cause to believe a contempt had been committed, and the committee should divide, two reporting that there was not reasonable cause and two reporting that there was reasonable cause, what condition would the court find itself in as to proceeding further?

Mr. RALSTON. I can only say that in this particular case I do not know that it would have introduced any special difficulty, because Mr. Justice Wright stated on the bench that if the committee had found any differently he would have set aside their report.

Mr. MCGILLICUDDY. Is not the report of that committee merely advisory, in any event?

Mr. RALSTON. Yes.

Mr. MCGILLICUDDY. The court is not bound by it at all?

Mr. RALSTON. No.

Mr. NORRIS. The court could disregard their finding if they reported against it, and make the rule any way.

Mr. RALSTON. No; not make the rule any way, because in cases of indirect contempt the court must have a sworn accusation in some shape before it before it can act.

Mr. MCGILLICUDDY. Is it your idea in this proposed substitution, referring these questions of fact to a jury, to make the finding of the jury conclusive, or merely advisory?

Mr. RALSTON. I think the finding of the jury ought to be conclusive.

Mr. MOON. It is in this bill.

Mr. MCGILLICUDDY. Yes; I understood it was.

Mr. RALSTON. I thank you, gentlemen, for your courtesy.

Mr. CARLIN. We are obliged to you, Mr. Ralston.

Mr. HENRY. Just at this particular juncture, on account of the turn that the discussion has taken, I want to make a statement of a few moments. I have to leave in a little while to keep another engagement. Some of us remember when the Swayne impeachment case was up. Judge Swayne was a judge in Florida, and he had undertaken to punish some lawyers there, two of them unnecessarily, and had disbarred two of them for 12 months, and gone beyond the terms of the contempt statute, and in the very teeth of a decision of the Supreme Court. I do not think we will have much difficulty sustaining the constitutionality of this act, and I want to meet every question candidly, as this committee should, and will. The case I want to call your attention to—and I know every one of you will read it—is the Robertson case in 19 Wallace, which was a case which came up from Arkansas, and the Federal judge there had undertaken to disbar a lawyer and take his license away from him. It is a very short case, and I want to call your attention to two or three sentences in it, and in doing that I will touch upon the question raised by Mr. Thomas, of Kentucky. Mr. Justice Field delivered the opinion, and said:

> The power to punish for contempts is inherent in all courts.

We will concede that. The Supreme Court says it.

> The moment the courts of the United States were called into existence and invested with jurisdiction over any subject they became possessed of this power.

We will admit that.

But the power has been limited and defined by the act of Congress of March 2, 1831.

That was the act passed after the Peck impeachment case, a Missouri Federal judge. We went over that case time and time again when we had this Swayne impeachment case up.

The act, in terms, applies to all courts; whether it can be held to limit the authority of the Supreme Court, which derives its existence and power from the Constitution, may, perhaps, be a matter of doubt.

We can also understand when the Supreme Court has exhausted its original jurisdiction, then Congress might have the power to pass a statute setting limits beyond which the Supreme Court, even, could not go.

But that it applies to the circuit and district courts there can be no question. These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them, the law specifying the cases in which summary punishment for contempts may be inflicted. It limits the power of these courts in this respect to three classes of cases.

And the three classes are as follows:

(1) Where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice.
(2) Where there has been misbehavior of any officer of the courts in his official transactions.
(3) Where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the courts.

We do not propose to undertake to take the power of punishing for contempt away from the courts, but we do propose to limit it and lay down a method by statute under which they shall proceed. It is a method of procedure.

The law happily prescribes the punishment which the conrt can impose for contempts. The seventeenth section of the judiciary act of 1789 (1 Stat. L., 73) declares that the court shall have power to punish contempts of their authority in any cause or hearing before them by fine or imprisonment, at their discretion.

I call your attention to this sentence particularly:

The enactment is a limitation upon the manner in which the power shall be exercise, and must be held to be a negation of ll other modes of punishment. The judgment of the court disbarring the petitioner, treated as a punishment for contempt, was therefore unauthorized and void.

Now, gentlemen, you can take that case and analyze it. It leaves no doubt in my mind that we have authority to set the limits and say that these inferior courts created by Congress under the third article of the Constitution, first clause, are subject to our right to deal with those creatures as we please. We might curtail that power in various ways to punish for contempt. No one proposes to take the power away from them; this bill does not propose to do it, but it lays down a plain method of procedure, and it does not lessen the dignity of these inferior courts. I understand that it has been contended by a Senator in the Senate that the judicial power means all the power that any court in England possessed when our Constitution was adopted. But there were those who answered him in the Senate and overwhelmed him in that argument and established the fact that Congress had a right to limit these inferior judicial tribunals created by Congress. I do not think there is any doubt about it.

There is no doubt in my mind that we have the right to set these limits here by statute and to amplify that statute of 1831 and subdivide contempts, as Mr. Justice Field did in his decision.

Mr. STERLING. Mr. Henry, I agree with you on that proposition, that we have a right to limit or extend this power. But does this bill simply propose to extend or limit the power? Is it not destroying altogether the power of the court to enforce a decree; that is, in taking it out of the power of the court and submit it to another tribunal? If it does that, it is not a limitation or an extension; it is a destruction.

Mr. HENRY. No more a destruction of the power than for us to say a defendant in any criminal case is entitled to trial by jury. There is not one particle of distinction, because the Federal judge then imposes the punishment after the jury passes on the guilt, and you are assuming that the juries are going to acquit everyone.

Mr. STERLING. No; I am not assuming. It is transferring the authority to some other tribunal than the judge.

Mr. CARLIN. I am in thorough sympathy with the principle laid down in this bill. I think the chairman of the committee has drafted a proposed bill which shows great thought and study—careful thought and study. But the very suggestion made by our friend, Mr. Sterling, seems to have been made in the Gompers case, and I want to ask you what you would do with this.

Mr. HENRY. All right. I know what you are going to say.

Mr. CARLIN (reading):

> There has been general recognition of the fact that the courts are clothed with this power, and must be authorized to exercise it without referring the issue of fact or law to another tribunal or to a jury of the same tribunal.

That is the language of the Supreme Court.

Mr. HENRY. In the first place, that is obiter dicta; and, in the second place, he says where you take the power away from the judge and transfer it to another tribunal—which we are not doing—we are providing a method of procedure, and we are not interfering with the power at all.

Mr. CARLIN. The court does not say that. The court says you must not refer the issue of fact or law to another tribunal or to a jury of the same tribunal.

Mr. HENRY. That is obiter dicta there—"so as to take the power away from the court," he says.

Mr. MOON. I want to say, Mr. Henry, I do not want by silent acquiescence to accept your statement. I think I can controvert it so absolutely that even you will yield. But I do not want to take the time of the committee while there are other people here to be heard.

Mr. THOMAS. I would like to hear from you.

Mr. MOON. You will, later on.

STATEMENT OF MR. HORACE PETTIT.

The CHAIRMAN. Mr. Pettit, we do not propose to limit you, but what time do you desire?

Mr. PETTIT. Mr. Chairman, I believe I can conclude all I desire to say in ten minutes.

The CHAIRMAN. Very well; you may proceed, first stating your name and address.

Mr. PETTIT. My name is Horace Pettit, of Philadelphia. I am practicing in the United States courts principally in the eastern district of Pennsylvaina and the southern district of New York.

I apprehend, especially in the particular class of cases that I am in, namely, patent suits, that should this bill go through great difficulty will be experienced in enforcing the decrees of the courts and a very large amount of additional expense will be involved.

Mr. Davenport has touched upon and argued quite liberally the question of the legality and constitutionality of this act. It seems to me that the Gompers decision has practically decided most of the questions involved in this bill. According to my reading, it would seem to me that Justice Lamar has decided there in the language that has been previously quoted by Mr. Davenport and referred to by one of the gentlemen of the committee, that the power can not be taken away from the courts and transferred to a jury to determine the question of contempt of a decree of the court. The court is always very jealous of its decrees, as we all know, and of its orders, and there is a long line of cases, as we all know, of how particular a court is that its decrees shall be strictly observed and enforced. To take away from the court, from the judge who enters the decree, the power to enforce that decree, to my mind would practically shake the foundations of the courts themselves.

The Circuit Court for the Southern District of New York has seen fit to very strictly construe and put a new construction upon the question of contempt, based on the Gompers decision. In a case which I had before the circut court, recently, and before Judge Lacomb, of contempt for the violation of a decree of the court based upon infringement of a patent, the court held that in view of the Gompers case the defendant could not be punished by imprisonment, even though it were clearly shown that he had flagrantly infringed the decree, nor could he be punished by fine unless the complainant shows a material damage and injury suffered by the contempt acts, and then he can only be punished to the extent of that damage shown by the complainant. That of itself is a very embarrassing situation, because it presents this: A decree is entered enjoining a defendant from infringing, we will say, a patent, as an illustration. The defendant disregards that decree, of course, and he is then brought in under an order to show cause why attachment should not issue. Under the decision of the circuit court the court can not, according to Judge Lacomb's decision in the case of Victor Talking Machine Co. against Segal, which I have here, hold the defendant in fine unless the amount of damage is shown, and then only to that extent; and he can not be imprisoned. Whether that decision is right or not remains to be seen. The question is coming up in the circuit court again in the southern district of New York in another case.

Mr. MOON. Have other courts besides Judge Lacomb's court so construed the Gompers decision?

Mr. PETTIT. I know of no other such case as yet. In one of these cases in the circuit court in the southern district of New York following, as they understand, the Gompers decision, information has been lodged by the district attorney and a warrent issued for the arrest of the infringer, and the judge is to try that case sitting as the committing magistrate. That may solve possibly the difficulties of this interpretation of the decision of the Gompers case, if it is correct.

But it seems to me, speaking to the present bill, that the Gompers case practically decides the question that the punishment for contempt can not be relegated away from the judge or the court to a jury, but that it is the inherent right of the court to punish its own contempts, or to punish the acts of contempt committed as to its decrees.

Why, then, change the present legislation? My inclination, Mr. Chairman, if anything, would be to slightly enlarge the powers of the court to punish in view of the interpretation placed upon the decision by the southern district of New York. However, that will possibly work out, and there may be methods and ways with out any amendment.

The new judicial code going into effect on January 1, as I understand it in this regard, section 268 is practically a copy of and the same as section 725 of the Revised Statutes.

Mr. MOON. Exactly; word for word.

Mr. PETTIT. Section 725 has been before the courts time and time again in hundreds of cases, and has been construed. To make new legislation at this time without, to my mind, so far as I can see, any particular reason for it is going to practically undo all the work that has been done, and we lose the benefit of constructions which have been given to this section of the statute by the courts. I have not, with all due deference to the other gentlemen who have spoken here, heard any very good reason why a jury should intervene, why the question of contempt acts should be taken away from the courts and relegated to the jury.

The procedure in contempt cases, in the Federal courts, is as has been indicated here. It may be by affidavit, and many cases perhaps have gone through on affidavit; but the party has the right to have witnesses called in open court and to have the judge himself there, with the witnesses before him, to determine whether or not the acts charged in the petition for attachment are true and correct. The judge then determines whether or not there has been a contempt and metes out proper punishment.

Mr. MOON. And the affidavit of the person charged is taken as a verity?

Mr. PETTIT. Exactly.

Mr. MOON. He can purge himself in that case?

Mr. PETTIT. Under the Gompers decision the court practically holds that, except in mandatory injunctions, the punishment in a civil case can not be inflicted by imprisonment, but by fine only. The court also, in the Gompers case—and, as I say, it seems to me it covers all these questions—has shown that this discretion of the court must be most carefully exercised. If gross abuse of discretion is present it is reviewable and would protect the defendant or the violator of the decree, so that he might have the right of appeal from any exercise of gross discretion.

I can see from a practical standpoint should this bill go through, that we are going to be most materially handicapped in the practical operation of the procedure proposed. As I say now, as it is, we are having great difficulty in many cases by reason of this present construction of having the defendants fined properly or imprisoned, if the circumstances warrant it, for disobedience of a decree of the court.

Mr. THOMAS. I do not wish to interrupt the gentleman, but could you not make the same argument along that line in favor of the abolition of all jury trials in every case?

Mr. PETTIT. Oh, no, sir.

Mr. THOMAS. I do not see why.

Mr. PETTIT. From time immemorial it has been true that a court's decrees—in fact, from the very nature of the organization of a court—must be enforced; that the court itself has the inherent right to enforce its own decrees. To intervene with a jury, even if it were constitutional, or were legal, would, as I say, complicate and involve the situation and prolong the matter indefinitely, involving expense that would be very material, looking toward an expeditious procedure of the enforcement of the decrees of the court.

Mr. Chairman and gentleman, I thank you for your attention, and I trust sincerely that this bill will not go through. It seems to me it would have most disastrous results, and will involve litigants in expense and delay that is unnecessary and unwarranted, and with all due respect to the gentlemen who have proposed the bill and introduced the bill or suggested it, and those who are in favor of it, I can see no good reason why the present law should be changed.

Mr. THOMAS. I do not wish to ask anything to be captious or to embarrass you; I am simply after information——

Mr. PETTIT. Yes, sir; I understand.

Mr. THOMAS. Has the Supreme Court of the United States any power except the power conferred on it by the Constitution and the acts of Congress?

Mr. PETTIT. That is all.

Mr. THOMAS. Has the Supreme Court any power to punish for contempt except that provided by statutory law?

Mr. PETTIT. It has the inherent right conferred upon it by the Constitution to do all that a judicial tribunal can or should do in order to enforce its decrees.

Mr. THOMAS. Please refer me to that article of the Constitution conferring that power.

Mr. PETTIT. It would not, perhaps, be specified in so many words, but the organization of that court, under and by virtue of the Constitution, would necessarily vest in that court that right to carry out all things judicial, even if there was not a statute at all.

Mr. THOMAS. Has not the Supreme Court certain jurisdiction specifically conferred on it by the Constitution?

Mr. PETTIT. Certainly.

Mr. THOMAS. Has it any other jurisdiction conferred on it by the Constitution, except what is conferred by statutory law?

Mr. PETTIT. It has no other jurisdiction than that which is given it specifically.

Mr. THOMAS. Then why can you, or anybody else, find out why it has any right to punish for contempt at all, except as conferred by statutory law? I am asking for the law. If you or anybody else can point it out, I will read it with pleasure.

Mr. PETTIT. As I say, the Constitution, in the organization of the court, gives to that court the right and power and vests in it the right and power to do everything that is there judicially required of a judicial tribunal.

Mr. STERLING. May I ask the gentleman a question?

Mr. THOMAS. Certainly.

Mr. STERLING. Suppose there were not any Federal statutes; do you not think the Supreme Court would have power to punish?

Mr. THOMAS. I do not. I think all the power the Supreme Court of the United States has is in the Constitution and in the statutory law. If you, or anybody else, will point out anything else they have, I will submit; but not any of you can do it, because the Constitution defines the powers of the Supreme Court of the United States, and the Constitution limits the powers of the Supreme Court of the United States. It gives them powers over ambassadors, and between citizens of the different States. It absolutely fixes and limits it.

Mr. NORRIS. If the Supreme Court would not have any power of that kind, how could they enforce any decree?

Mr. THOMAS. By statutory law.

Mr. NORRIS. If we did not have the statutory law providing for their enforcement?

Mr. THOMAS. We have a Congress to pass that.

Mr. NORRIS. I understand that; but if they did not pass a law, they could not enforce their decrees.

Mr. THOMAS. That is a supposition which is impossible.

Mr. NORRIS. We might not have necessity for——

Mr. THOMAS (interposing). Then they have no power.

Mr. NORRIS. And there would be no other way?

Mr. THOMAS. They would have no power if they did not have the statute.

Mr. MOON. It has been held one hundred times they have it independently of any statute. It has been stated a court would be too low for contempt if it could not protect itself against contempt.

Mr. THOMAS. In this case of Bassett against Conklin, it is said that Congress has the right to define and limit the power to punish contempt.

Mr. NORRIS. I do not think, even taking that contention, it would follow, if we did not define it, that they would not have the power.

Mr. THOMAS. Why not say the Supreme Court itself could exist independently of Congress, if no act had been passed creating the Supreme Court?

Mr. MOON. It could. It is created by the Constitution. It does not depend on Congress at all.

The CHAIRMAN. Mr. Pettit, have you concluded?

Mr. PETTIT. Yes, Mr. Chairman.

The CHAIRMAN. If you desire to file any statement or brief with the committee, you may do so within three or four days.

Mr. PETTIT. Thank you, Mr. Chairman.

Mr. EMERY. Mr. Chairman——

The CHAIRMAN. Will you please state your name and residence?

Mr. EMERY. My name is James A. Emery; I am general counsel of the National Association of Manufacturers.

The CHAIRMAN. What is it you desire to say?

Mr. EMERY. In appearing before this committee, I will also represent a very large number of commercial and industrial organizations, a list of which I will file with the committee.

The hour is already late, and I am under the unfortunate necessity of leaving the city, and I presume the committee is somewhat tired by the strenuous thought it has given to this very interesting sub-

ject, and I should like to ask that the committee will permit me to be heard on Saturday morning. I have to be out of the city to-morrow, or I would make it any time to-morrow that suits the convenience of the committee.

Mr. MOON. I hope you will not make it Saturday morning, because I can not be here.

Mr. THOMAS. I move we hear the gentleman on Saturday morning.

Mr. EMERY. Mr. Moon, can you be here Saturday afternoon or Monday morning?

Mr. MOON. I can be here Monday morning.

Mr. EMERY. Can the committee hear me on Monday morning, then?

The CHAIRMAN. That is with the committee. I suppose we want to conclude the hearings, and then take up this matter in executive session of the committee.

Mr. MOON. Mr. Davenport, for instance, will require three or four days to publish. We certainly would not want to take this up for consideration until they get these published reports.

The CHAIRMAN. Certainly not. The point I was suggesting was that it is impossible for the committee to accommodate itself to the desires of every gentlemen who wants to be present.

Mr. MOON. Undoubtedly; I understand that.

The CHAIRMAN. The committee would like to conclude these public hearings and then get down to the real work that the committee has in hand of considering this subject in a detail way.

Mr. EMERY. If you will permit me, I am sure the committee needs no word from any outside source as to the imporatnce of this question. Indeed, it is revolutionary in its proposals, and I am representing a very large number of important business interests throughout this country who will be greatly affected by procedure of this character, and while I dislike greatly to delay the proceedings of the committee and will not do so absolutely beyond the time you have given me for hearing, if you can put it on Monday morning, I would very greatly appreciate it, because I am returning here on Saturday to keep this engagement.

Mr. STERLING. I would like to suggest in behalf of three members of this committee, who are members of the Steel Investigation Committee, that there is a meeting set for that committee on Monday morning. Personally I will not ask any change in the desires of this committee, however.

Mr. CARLIN. This is an important question, Mr. Chairman. I think there should be some deference shown to the wishes of the members. We have had a goodly attendance, and I think we will continue to have it, but I think we would like to hear the gentleman. I hope we will be able to fix some day which will suit the convenience of all the members of the committee.

The CHAIRMAN. Could you be here Saturday?

Mr. EMERY. Yes, sir; I can; but Mr. Moon can not.

Mr. MOON. I will have to read the proceedings, then.

Mr. THOMAS. When will it suit you, Mr, Moon?

Mr. MOON. I have not any right to direct this committee, but I do feel this matter is of too great importance to be rushed through in a few days or to pass without any consideration whatever. We have

the whole session before us, and we shall not legislate upon any more important subject than this matter during this session.

The CHAIRMAN. In justice to the committee, Mr. Moon, permit me to say the committee was called together last summer for the purpose of considering this measure, and the suggestion was then made to let it go over until this session in order to have this hearing and expedite the determination of the consideration of the measure. It was carried over until this session, and public notice was given in the press repeatedly that this hearing would be had. This committee has a multitude of other things to consider, and the consideration of this bill is made a continuing order, and therefore, under the precedent of the former chairmen of this committee, nothing can displace it. You will remember that arose in the alcoholic liquor case, where Mr. Littlefield insisted upon the continuing order, and you will recollect how that blocked the business of the committee for some days, if not weeks. In order to dispose of that continuing order and its onerous burden, in view of the work before the committee and this continuing order, and in the light of the experience we have had in cases occupying a similar position with this one before the committee, I have made the suggestion that we ought to conclude the hearing as early as possible. I am sure there is no disposition on the part of anybody not to have a full and ample hearing, and it might also be observed that not a single man has appeared here to-day to make an argument in behalf of this bill, and it seems to me those in opposition to the bill have already had one day, and the committee has indulged them, and nobody has appeared here to make an argument in behalf of the bill.

Mr. MOON. Mr. Ralston appeared in behalf of the bill.

The CHAIRMAN. Mr. Ralston did not come in behalf of the bill. I simply wrote a note to him suggesting that in view of his participation in measures similar to this——

Mr. MOON (interposing). I do not care how he came. He was here in behalf of the bill.

The CHAIRMAN. He said to the committee very frankly he had not given consideration to this measure; but assuming that he did come, Mr. Ralston has concluded his statement and has occupied but a very small portion of the time to-day. The committee can do as it pleases, and I shall acquiesce cheerfully in whatever the committee chooses to do, but it seems to me the request preferred by the gentleman to be heard Saturday is one that should be granted by the committee.

Mr. EMERY. If you will pardon me, Mr. Chairman, you referred to the opponents of the bill having been heard first. It is a decided disadvantage to the opposition to be compelled to prove the negative——

The CHAIRMAN (interposing). You misunderstood me. Mr. Ralston started to make his statement, and at Mr. Davenport's request the matter was suspended and the opponents of the bill were then heard. Mr. Ralston then concluded his remarks, and then Mr. Pettit appeared in opposition to the bill, and now you are here in opposition to the bill, which is all proper, and we are glad to have you.

Mr. EMERY. I will be very glad to suspend and hear the proponents first.

The CHAIRMAN. These hearings are more or less informal. We are compelled by the nature of things to proceed in that way The committee is very much obliged to you for suggesting the manner of its procedure, but it must be the judge of that itself.

Mr. EMERY. Please do not understand me to suggest anything of that sort, Mr. Chairman.

The CHAIRMAN. It is for us to say what time you will be granted for hearing. You have asked for Saturday——

Mr. THOMAS (interposing). But Judge Moon says he can not be here Saturday.

The CHAIRMAN. Judge Moon has waived that privilege.

Mr. MOON. I have never in my experience, Mr. Chairman, seen a great, important, and overwhelming subject like this hurried through. I think if these people came here on account of the business interests involved and asked for two weeks or three weeks or four weeks, it would be the duty of this committee to give that time to them.

Mr. THOMAS. I am particularly anxious to hear Judge Moon on this subject, because I think he is one of the best lawyers in the House. I do not expect to agree with him, but I want to hear him, anyway.

Mr. EMERY. I would ask you to note, Mr. Chairman, that since this bill has been proposed for public hearing there has been on my behalf a request for opportunity to be heard, and I think it has been in your possession for six or eight months.

The CHAIRMAN. The chairman has signified the willingness of the committee to hear you, and you are here and now you ask that that hearing, on account of the lateness of the hour, be extended over until Saturday.

What is the pleasure of the committee?

Mr. THOMAS. I move that the request be granted.

The CHAIRMAN. Very well; we will hear Mr. Emery at 10.30 o'clock Saturday morning next.

Mr. STERLING. There may be other gentlemen who would like to be heard to-morrow.

The CHAIRMAN. The committee will then meet, under the order which we adopted to-day, at 10.30 to-morrow morning, and if anybody else appears to be heard then, we will hear them. If no outsider appears, I suggest the committee themselves might engage in an informal discussion. It may be Representative Wilson can be heard to-morrow at 10.30. With that understanding the committee will now stand adjourned until to-morrow morning at half-past 10 o'clock.

(Thereupon, at 4.30 o'clock p. m., the committee adjourned until to-morrow, Friday, December 8, 1911, at 10.30 o'clock a. m.)

FRIDAY, DECEMBER 8, 1911.

The committee met at 10.30 o'clock a. m., Hon. Henry D. Clayton, chairman, presiding.

The CHAIRMAN. The committee will be in order. The committee has met this morning after recess, which was provided for in the original motion controlling the deliberation of the committee for hearings on the contempt bill, and Representative Wilson of Pennsylvania now desires to be heard.

STATEMENT OF HON. WILLIAM B. WILSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA.

Mr. WILSON. Mr. Chairman, gentlemen of the committee, in appearing before the committee I do not do so in the capacity of a man learned in the law. I am not a lawyer and do not propose to discuss the principles embodied in the bill from the standpoint of a lawyer or from the standpoint of its constitutionality as it appeals to a lawyer, but as it appeals to an ordinary layman—a workingman. I favor the bill pending before the committee (H. R. 13578), with amendments at two parts of the bill if they can be secured. But I am in favor of the bill whether those amendments can be secured or not. In favoring the bill I do not believe it will solve entirely the question which organized labor has been presenting to the consideration of the Members of Congress, growing out of the issuance of injunctions in labor disputes.

Mr. HOWLAND. It is not intended to cover that at all.

Mr. WILSON. It is intended, as I understand it, to cover the contempts growing out of that, and out of all other matters arising in the courts.

Mr. HOWLAND. But it is not intended at all to cover the injunction legislation.

The CHAIRMAN. No; this does not relate to injunctions.

Mr. HOWLAND. Except indirectly.

Mr. WILSON. I understand, Mr. Chairman, that, so far as this bill itself is concerned, it has no relation to the issuance of injunctions, except in so far as contempt proceedings in some cases grow out of the issuance of injunctions. In so far as contempt proceedings grow out of the issuance of injunctions, it has a relationship to those injunctions. One amendment, which I will suggest—not specifically—will be to add to clause a of section 2 the words "or so near thereto as to obstruct the administration of justice." That, as I understand it, is an exact quotation from existing law; but nevertheless it is broad, exceedingly broad, and the court may with perfect propriety, in its discretion, assume that any obstruction to the enforcement of any writ issued by the court is an obstruction to the administration of justice, and if that construction is placed upon the language by the court, then the purpose of this bill, in so far as it divides contempts into two classes, would not be accomplished. While I have not been able, in my own mind, to draft language that would obviate that condition, it seems to me that the committee should take that phase of the situation into careful consideration.

The other point that I have in mind as requiring amendment is in the last sentence in section 4, where it says, "If the accused shall be found guilty, judgment shall be entered accordingly, prescribing the punishment." If these cases of direct contempt are to be treated in the same manner as criminal cases, then there is no reason why there should not be a limitation upon the powers of the court to inflict punishment, and, in my judgment, those things that can be enacted into law giving specific direction to the court as to what it should do should be enacted into law.

During the past twelve hundred years, or since the peace of Wedmore was signed between Guthrum the Dane and Alfred the Great,

there has been a continual conflict between two distinct forms of government and administration of government, between that form of government which is a government by law and that form of government which is a government by the discretion of one man vested with the power of exercising that discretion, and during all the years intervening between the signing of that peace and the signing of the Declaration of Independence there had been a continual contest in Great Britain, from which we derive to a great extent our judicial procedure. There had been a continual conflict between those two forms of government, the idea of government by law gradually encroaching upon the idea of government by discretion, the powers of the courts, derived from the power of the king originally, being continually restricted and defined by law. So that when the Declaration of Independence was signed and when our Constitution was adopted the powers of the chancery courts of Great Britain had been very much restricted from what they had been before. The chancery courts at that time had no jurisdiction except where property and property rights were involved.

It can not be said, no matter what construction you may place upon the Constitution, that our courts, from the Supreme Court down, could have secured any greater power in equity than that which existed in the chancery courts of Great Britain at the time that our Constitution was adopted. I doubt even it they were given as much power as the chancery courts had, because if I recall the Constitution distinctly it provides that our judicial power shall have jurisdiction of all cases in law and equity arising under the Constitution and laws and then a number of other specific grants of power. It is the power in equity arising under the Constitution and laws which is granted to the Supreme Court and the other courts, and no greater power than that could be given to our courts of chancery or courts of equity. Yet there has been, during the period of our existence as an independent government, a gradual assumption of power on the part of our courts under the plea that the courts have inherent powers and that they have the right to exercise those inherent powers. I contend that our courts have no inherent powers; that the only powers which our courts have are the powers which are granted to them by the Constitution and by our laws, and that all other powers exercised by our courts are usurpations of authority. I can realize that where the court believes that such powers are implied in order to carry out the powers that are specifically granted will exercise its discretion in the use of those implied powers where there is no law to the contrary. But when the question arises in the legislative branch of the Government as to how far those implied powers can be carried by the courts of our country, then the legislative branch of the Government has, or at least should have, the power to determine whether or not the construction of the court relative to its implied powers is correct or incorrect and to define the limitations of those implied powers.

This bill proposes to limit some of those powers which the courts assume are implied, or, rather, which they have assumed are inherent, and which are not inherent. The only reason which I can give why the courts should assume to go beyond the jurisdiction of property rights in the issuance of injunctions, or contempt proceedings growing out of those injunctions, is upon the assumption that one man has a property right in another man. That might have been the case, and

undoubtedly was the case, in many instances, prior to the adoption of the thirteenth amendment. But since the adoption of the thirteenth amendment it can not be said that one man has a property right in another man, and when a court assumes to issue an injunction saying to me that I must not induce you to leave the employment of another man, it assumes, if it does not go beyond the rights to exercise its power where property and property rights alone are involved, that the other man has a property right in you, and only upon that basis can there be an injunction of that character issued, and contempt proceedings growing out of it.

My contention is that the courts have gone beyond the powers granted to them by the Constitution, and beyond the powers which can even be claimed by the court, on the part of those who assume that it has inherent powers, when it assumes to issue an injunction of that character; and, further, when it assumes to issue an injunction restraining me from associating with somebody else in refusing to purchase an article made by another party, or, in other words, to boycott, because our courts, following precedents laid down from the time when men were serfs, have assumed that patronage and good will in business are property or property rights.

Patronage and good will in business, if they are property at all, are the property of the persons who have the patronage and the good will to bestow, and I can conceive of no other way in which the idea of patronage and good will in property has grown up in the minds of our judiciary than through the fact that when some one purchases the business of some one else that has been established, and purchases the good will of the seller with it, they have gradually come to the conclusion that there is more than his good will which has been purchased, that there is also purchased the good will of his customers, which, as a matter of course, can not be, because he has no power to sell their good will; but by selling his business he sells the opportunity of coming in contact with these individuals, thereby retaining the good will. But the good will itself and the patronage in business—and I want to reiterate this statement—the patronage in business and the good will itself, if property, are the property of the man who has the patronage and the good will to bestow, and not of the man who is receiving the benefits of that patronage and good will. So that in both of those instances the courts, in my judgment, exceed the constitutional powers granted to them, and may be prevented from exceeding those powers by the enactment of legislation on the part of Congress.

One of the reasons why we believe that this measure in itself, while a step in the right direction—a step away from autocracy toward democracy, a step from the condition of discretion on the part of one man as to the administration of justice to a more democratic form of administering it—will not give the relief in its entirety that we believe the people are entitled to, is this: That when a citation to show cause why they should not be held in contempt is heard before the court, and a trial by jury is secured, the question as to whether the court, in issuing the injunction or restraining orders, or other cause upon which contempt proceedings are based, had exceeded its authority, will not be before the jury to determine.

The sole thing that will be before the jury to determine will be the question of fact, as to whether or not the order of the court has been

disobeyed and the question of whether or not the court exceeded its jurisdiction in issuing that order will not be before the courts. I have in mind as an instance an injunction issued in Judge Dayton's court, in the northern district of western Virginia, at the instance of the Hitchman Coal & Coke Co. against John Mitchell and others, where there was no strike on, had been no strike on, no trade dispute of any kind in existence, and yet the Hitchman Coal & Coke Co. secured an injunction restraining John Mitchell and others associated with him from inducing the men employed by the Hitchman Coal & Coke Co. or others who might seek to become employees of the Hitchman Coal & Coke Co. from joining the United Mine Workers of America.

Mr. DAVIS. Are you not in error in saying there was no trade dispute on at the time?

Mr. WILSON. No; I am not in error about that. But there was this: Two or three years prior to that time there had been a trade dispute on and there were some activities on the part of the organizers in that neighborhood in a hope of reorganizing those workmen, and the fear, apparently, on the part of the Hitchman Coal & Coke Co. was that, as a result of those activities, the men would be organized, and that then, after they were organized, a trade dispute would arise.

Mr. DAVIS. I was under the impression that there was a strike; local in character, not general.

Mr. WILSON. No; there was no local strike. I happened to be familiar with that particular situation and there was no local strike at that time. There had been at some time prior to that time a local strike, but that local strike had ended, and in the ending of the local strike the local organization of the mine workers had gone out of existence, and an effort was being made to reorganize the workers into a local union of the mine workers when this injunction was issued in Judge Dayton's court.

Mr. HOWLAND. Was not that a temporary restraining order? It was not a permanent injunction?

Mr. WILSON. No; but it was continued and continued and continued, and, so far as I know, is still continued as a temporary order.

Mr. HOWLAND. By consent of counsel on both sides?

Mr. WILSON. By consent of counsel on both sides; on the ground that service of the papers in the temporary restraining order had not been secured upon Mr. Mitchell and one or two others who are specifically named in the bill.

Mr. DAVIS. I am under the impression—I may be wrong, but I think I am right—that the injunction has been made perpetual nemine contradicente.

Mr. WILSON. I do not remember of its having been made perpetual; it may have been. But I know it was issued in 1907, and that it was continued for several years after that time in its temporary form on the ground that service of the papers had not been secured upon Mr. Mitchell and others who were named in the bill, and that it was continued in that form. However, the point I want to bring to the attention of the committee is this, that in the event of contempt proceedings growing out of an injunction of that kind, proceedings under this measure, if it were enacted into law, the question of the right of the court to issue a restraining order of this character would not be involved in the hearing. The only question for the jury to

determine would be the question of whether or not the parties who were being tried for contempt had been guilty of violating the order. I think it is Getty who says that the greatest element of terror is the unknown, and one of the reasons why these injunctions have been of so great an injury to the wageworkers of the country has been because of the fact that the injunction is a law unto itself, and it is seldom the case that the court issuing the injunction knows at the time it issues it what interpretation he will place upon it in the event of contempt proceeding following, and those against whom the injuction is issued are not in a position to determine what construction will be placed upon it. They can not determine from the injunction itself what their rights are under the injunction, and hence the terror that follows in connection with it.

We believe that the enactment of this measure will give some relief, not only in those cases but in other cases generally. Yesterday the question of remedial contempt was referred to and the intimation thrown out that there ought to be trial by jury in cases involving the liberty of the citizen, but that in cases involving the property of the citizen it was doubtful whether a jury trial should obtain. In my judgment no one man should have the power to either imprison another man or take his property except upon the judgment of his peers, and the only exception I would make to that condition would be where the persons being held for contempt were engaged in obstructing the court in its operations so that it could not proceed with the administration of justice.

Those are the few points which I have to make in connection with this measure, that it is a step in the direction of democracy and away from autocracy; that it is a step toward government by law and away from government by the discretion of any one man; and the nearer we get toward the point of government by law and away from government by the discretion of any one man, the better it will be for all of our people.

Mr. NORRIS. Mr. Wilson, I came in after you had started. Did you suggest some amendments to this measure?

Mr. WILSON. Yes; not specifically, but I simply pointed out where, in my judgment. the bill could be strengthened; but that, in the event of the inability of the committee to see its way clear to amend in accordance with my suggestions, nevertheless I would be in favor of the bill as being a step in the right direction. Those points were in sections 2 and 4; that point of the bill where it quotes existing law.

Mr. NORRIS. I will not ask you to repeat it if it is already in.

Mr. GRAHAM. Mr. Wilson, you found some fault with the concluding line of paragraph a of section 2?

Mr. WILSON. Yes.

Mr. GRAHAM. Have you given us as specific information as you have on that? Have you any suggestion of a definite character to make?

Mr. WILSON. I have not, because I have not been able in the time I have devoted to it to devise language that would overcome the difficulty. But the difficulty is there, nevertheless, that the courts may, with perfect propriety, put a very wide construction upon that clause of section 2 so as to destroy the effect of this measure as it applies to indirect contempts.

STATEMENT OF HON. N. E. KENDALL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IOWA.

The CHAIRMAN. We will hear Mr. Kendall.

Mr. KENDALL. Mr. Chairman, I want to submit an observation or two to the committee with reference to what I believe to be the necessity of imposing some limitation upon the power of the chancellor to issue injunctions. I recognize that that question is not now involved in this bill, and I hope to have an opportunity to develop my views on that subject before the committee at some other time.

Mr. HENRY. Mr. Kendall, I have a bill pending on that very question that I intend to ask the committee to take up later.

Mr. KENDALL. I like my bill a little better than yours; but I sympathize with the purpose you have in view.

With reference to this bill I am very anxious to be heard briefly before the committee in support of the principle that is involved in it. I think the fundamental principle involved here is the establishment of the right of the trial by jury where the defendant is alleged to be in contempt; but I regret that I can not be heard this morning, because I am compelled to retire from the meeting now to attend the meeting of the Iowa delegation. I want to ask the indulgence of the committee for about 10 minutes before any decision is arrived at on the subject, and I will accommodate myself to any regulation the committee may make with reference to that.

The CHAIRMAN. Will it be convenient for you to come back to-morrow?

Mr. KENDALL. I think so. I suppose it would be perfectly proper, while I want to keep within the limits of this bill, to consider at some length the practice of courts now with reference to proceeding in contempts. Mr. Ralston has, in the remarks he submitted to the committee, developed a very interesting situation here in the District of Columbia, with reference to the method adopted by the court to ascertain whether a rule ought to be ordered against Gompers, Mitchell, and Morrison. It appears from what he said that the court who had had jurisdiction of the entire controversy between the Bucks Stove & Range Co. and Mr. Gompers and his associates, had made a finding which had been reversed by the Supreme Court, as I understand it, and after the entire issue had been remanded to him for further consideration, being in doubt whether any contempt had been committed, delegated to the attorneys who represented the Bucks Stove & Range Co. people the authority to institute the investigation and report to the court whether any contempt had in fact been intended; and I think that is so unique it ought to be considered by this committee, and I want to make a remark or two on that if I get to it. I will try to come back to-morrow.

(Thereupon, at 11.10 o'clock a. m., the committee proceeded to other business.)

SATURDAY, DECEMBER 9, 1911.

Pursuant to adjournment, the committee met at 10.30 o'clock a. m., Hon. Henry D. Clayton, chairman, presiding.

STATEMENT OF MR. JAMES A. EMERY.

The CHAIRMAN. Mr. Emery, if you are ready, we will hear you now.

Please give your name and address to the reporter.

Mr. EMERY. My name is James A. Emery; I am general counsel of the National Association of Manufacturers; my local address is Union Trust Building, Washington, D. C.

The CHAIRMAN. You may proceed with your statement, Mr. Emery.

Mr. EMERY. Mr. Chairman and gentlemen of the committee, I appear before this committee in opposition to this measure in a representative capacity as general counsel of the National Association of Manufacturers, and representing also a large number of commercial and industrial organizations in various parts of the United States, a list of which I will file with the chairman of the committee, numbering in their membership approximately 100,000 men engaged in various forms of business, productive and commercial, throughout the United States.

They are intensely interested, not only in what they conceive to be the effect of the principles which underlie this bill, but the practical consequences that would follow the limitations it would impose upon the powers of courts of the United States and the revolutionary change it proposes in the time-honored procedure by which they give effect to their orders and decrees.

I am sure this committee recognizes that two very important questions necessarily present themselves in considering a measure of this character, the first and most important of which is the power of the Congress to curtail and, as we conceive it, impair and destroy, under the guise of regulating, the power now possessed by inferior courts of the United States to exclusively investigate and punish contempts of their authority.

I assume, Mr. Chairman, that this committee and every member of Congress would dispose of the question of the power to enact it before considering the policy or expediency of this proposal, for I may safely suppose that the novelty and unprecedented character of this bill would suggest that primary duty so well expressed by Cooley in his Principles of Constitutional Law:

> Legislators have their authority measured by the Constitution; they are chosen to do what it permits, and nothing more, and they take solemn oath to obey and support it. When they disregard its provisions, they usurp authority, abuse their trust, and violate the promise they have confirmed by an oath. To pass an act when they are in doubt whether it does not violate the Constitution is to treat as of no force the most imperative obligations any person can assume. A business agent who would deal in that manner with his principal's business would be treated as untrustworthy. A witness in court who would treat his oath thus lightly, and affirm things concerning which he was in doubt, would be held a criminal. Indeed, it is because the legislature has applied the judgment of its members to the question of its authority to pass the proposed law, and has only passed it after being satisfied of the authority, that the judiciary waive their own doubts and give it their support.

Mr. STERLING. What is that from?

Mr. EMERY. Cooley's Principles of Constitutional Law, page 160.

I proceed, therefore, with your indulgence, to discuss, first, the power of the legislative branch to place the restrictions here suggested upon the inferior courts of the United States.

Let me give my attention, at the outset, to the assertion made by the distinguished gentlemen from Kentucky, that the Supreme and inferior courts of the United States possess no powers but those which Congress confers upon them, for if that be true, then, indeed, Congress, having made them as truly as God made Adam from the dust of Eden, is their creator and master, and may abolish them or so limit the exercise of their power as in its judgment seems wise, and is responsible only politically to the constituency which elects it.

But it is a matter of elementary knowledge that this Government is divided into three separate, distinct, and coordinate branches, each exclusive within the sphere of its own action, each forbidden to exercise or trespass upon the powers of the other two, and all deriving their existence and authority from the Constitution.

The Constitution provides that the judicial power of the United States shall be vested in one supreme court and in such inferior courts as Congress may from time to time ordain and establish. (Art. III, sec. 1, of the Constitution.)

What is the extent of judicial power here conferred, Mr. Chairman? This is immediately answered by the second section of Article III:

> The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, etc.

The section then proceeds to define the various characters of controversies to which it shall apply.

In the same section not only is judicial power conferred, but original jurisdiction, as distinguished from that power, is given to the Supreme Court of the United States in two instances, and in two alone—in cases affecting ambassadors, consuls, and other public officers, and in controversies to which a State is a party.

Appellate jurisdiction is thereafter given to the Supreme Court of the United States, subject to congressional regulation.

But, sirs, the original jurisdiction of the Supreme Court of the United States can not be enlarged by Congress, nor can it be diminished. That has been repeatedly decided, as you well know.

Where, then, is the remaining judicial power of the United States that deals with controversies that do not affect public officers or to which States are not a party, that great body of controversies which arise from day to day and in all parts of the Nation between citizens of the United States who, unless they can be effectively protected, do not enjoy those rights of life and property the organic instrument of Government was designed to secure and maintain.

Where, then, is the remaining judicial power of the United States? There is but one series of tribunals in which it can be vested under the Constitution of the United States, and that is the inferior courts of the United States which Congress shall ordain and establish. The quality of the power conferred upon the Supreme and inferior courts must be identical for it proceeds from the same instrument, is expressed in the same language, is given at the same time, and devolves upon these courts for the same purpose. In controversies between citizens of the United States, the matters at issue are no less important than those of which the Supreme Court of the United States is given original jurisdiction. But unless these inferior tribunals were brought into existence, there would be no complete

and practical instrumentality to "establish justice" as contemplated in the Constitution for there would be no courts to whom citizens of the United States could carry their justiciable controversies.

The same duty devolves upon Congress to establish and ordain these courts as to organize the Supreme Court of the United States; for, sirs, it can not be a matter of doubt in your minds that in so far as the Supreme Court of the United States itself is an effective instrumentality to administer justice, it was established by the Congress of the United States. They numbered its judges, and they can to-day number its judges. They alone have provided it with a system of appeals by which suitors may reach its doors. They have left to it the method by which it shall enforce its orders and administer its decrees, but they have supplied it with all its machinery, the place in which it shall sit, and all those things which give it practical existence as a court. Therefore, in the sense of the word that they gave it practical being, they brought the Supreme Court into existence in the same manner that they gave form and substance to inferior courts of the United States.

But, sirs, was it within the discretion of the Congress to leave the judicial powers of the United States without a receptacle? Could Congress have refused to create a Supreme Court or inferior Federal tribunals? In the sense of the word that there is and was no mandatory power in law that could compel Congress to bring these courts into existence, and that they could not, ex proprio vigore, have come into existence themselves, they might have remained in the limbo of nothingness. But that a duty created by the Constitution and recognized by Congress rested upon that body to give effective expression to the Constitution itself and to create the receptacles in which the Constitution would vest the judicial power there can be no doubt. That was decided at a very early period in the history of our Government, for there were those who then contended that the term "may be vested" with reference to the judicial power, or at least with respect to the constitution of the Supreme Court and the inferior Federal tribunals, was simply an expression of discretion, in the future tense—that it did not imply a present obligation and duty.

In the case of Martin *v.* Hunter (1 Wheat., 304), commented on extensively by Story in his famous work on the Constitution, that very issue, you will remember, was raised, and the question whether Congress possessed any discretion as to the creation of the Supreme Court and the inferior courts in which the judicial power would be vested was answered.

Mr. Story commented upon that decision, in which it was held no such discretion vested, and that the word "may" so used was to be construed as "shall," thus placing upon Congress a very important duty. He said "it is obvious" that if Congress possessed any "discretion" in the matter—

> The judiciary as a coordinate department of the Government may at the will of Congress be annihilated or stripped of all its important jurisdiction; for, if the discretion exists, no one can say in what manner or at what time or under what circumstances it may or ought to be exercised.

This of course must conclusively meet the argument that "shall be vested" was not imperative, but merely applied to the future tense.

Then, sirs, to the question where does the judicial power of the United States reside as a separate, distinct, and coordinate branch of this Government, there can be but one answer—in the courts of the United States, in those courts in which is vested the judicial power flowing from the Constitution—one Supreme Court, and such inferior courts as Congress shall ordain and establish.

At a very early period in our Government, the Supreme Court of the United States recognized the difference between constitutional courts, deriving their authority and powers from the Constitution, and legislative courts, deriving their authority and powers from the legislature alone.

That differentiation between constitutional courts and legislative courts was established by Mr. Justice Marshall himself in the famous decision in the case of American Insurance Company *v.* Canter (1 Peters, 511), where he was called upon to distinguish between the powers of a legislative court created for the Territory of Florida and a district court of the United States.

Speaking of these territorial courts, Justice Marshall said:

> These courts, then, are not constitutional courts in which the judicial power conferred by the Constitution on the General Government can be deposited. They are incapable of receiving it. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the Territories of the United States.

Or, as he said, under the general power of sovereignty incidental to the government of territory owned by the United States.

So that at that very early period in our history an essential difference was recognized between the courts of the United States, supreme and inferior, as constitutional courts deriving their authority from the Constitution of the United States, and the sole receptacles of its judicial power, and the courts of the Federal territories deriving their authority from the legislative power of Congress alone.

Mr. DODDS. Are the inferior courts referred to in the Constitution constitutional courts or legislative courts?

Mr. EMERY. They are constitutional courts.

Mr. HENRY. Will the gentleman allow me to ask a question?

Mr. EMERY. Certainly, Mr. Henry.

Mr. HENRY. What power creates the police court of the District of Columbia?

Mr. EMERY. It is created by Congress.

Mr. HENRY. What powers have those police courts?

Mr. EMERY. I am not familiar with the organic act of the District of Columbia.

Mr. HENRY. They are constitutional courts, are they not?

Mr. EMERY. I think not.

Mr. HENRY. Would they have the same judicial power these other inferior constitutional courts have, of which you speak?

Mr. EMERY. They are not constitutional courts—that is, the police court—within the meaning of the Constitution, Article III, section 1.

Mr. HENRY. Why not? Are they not created under that article?

Mr. EMERY. I do not understand they are. They are created under the power to provide for the government of the District of Columbia. I will not discuss that question, however, because I am not familiar with the particular court mentioned, and it is evidently of no consequence to the argument I am making what the character of that particular court may be. I do say the circuit and district

courts of the United States are courts of that character, and so recognized by the Supreme Court of the United States.

Mr. HENRY. If they are inferior courts under that provision of the Constitution, then your argument would necessarily lead to the proposition that they have the same judicial power these other inferior courts have?

Mr. EMERY. If they were inferior courts within the meaning of that article, that would be true.

Mr. HENRY. And Congress would have no right to circumscribe their jurisdiction?

Mr. EMERY. I do not say that.

Mr. HENRY. Any more than it would the jurisdiction of other inferior courts?

Mr. EMERY. I have not contended that Congress has not the right to circumscribe the jurisdiction of inferior Federal courts. I am considering whence the judicial power, as distinguished from jurisdiction, is derived, and its nature.

Mr. HENRY. You would take the position Congress would have no right to take that judicial power away from them?

Mr. EMERY. I am not going to answer that question with respect to a court of whose constitution I have no knowledge. I answer it with respect to circuit and district courts of the United States.

Mr. HENRY. I would like to see you draw the distinction there.

Mr. DAVIS. Has not Congress, by the present judicial code, withdrawn all judicial power from the circuit court?

Mr. EMERY. No, sir.

Mr. DAVIS. By the abolition of the court Congress has taken away the judicial powers which it invested in the circuit court.

Mr. EMERY. Yes. It has deposited it elsewhere in a new tribunal. What you call the courts which you establish is of no consequence. Congress could have called the Supreme Court of the United States by any other name it pleased. Whatever it called it, it would have had the judicial power which flowed to one supreme court from the Constitution. Congress has done no more than create a receptacle into which that power flowed. It did not create the power but merely gave form to the tribunal which exercises it.

In a further section of the Constitution Congress is empowered to create certain inferior courts——

Mr. MCCOY (interposing). Suppose that Congress should determine to abolish all the inferior courts and to create new courts, could not they, in the act creating the new courts, prescribe what they please in regard to them?

Mr. EMERY. You mean in regard to their power?

Mr. MCCOY. In regard to anything; yes.

Mr. EMERY. I will answer you in this way: I understand by "judicial power" the power to hear and to decide and to enforce a judgment in a justiciable proceeding.

Your proposition must necessarily involve this, that Congress has at once the power to create a court and to make it something else than a court.

On the negative side of that proposition it has again and again been held that Congress could not create a court and give it administrative or legislative powers, nor compel it to perform administrative

functions, nor to be the legal adviser of governmental officials. Those things have all been decided, respecting the right or power of Congress to compel the judicial branch of the Government to perform other than judicial functions.

Mr. WILSON (Representative from Pennsylvania). Do you consider a jury as a part of the court in the definition which you have just given?

Mr. EMERY. It is a part of a common-law court. It is not a part of a court of equity, except as an advisory body.

Mr. WILSON. But in view of the fact that the Constitution provides that the powers of the court shall extend to all cases in law and in equity arising under the Constitution and laws, would you not thereby consider that a jury is a part of the court if the law creates a jury?

Mr. EMERY. I should answer that in the language of the Supreme Court of the United States, which has frequently answered the question, and if the gentleman will permit me I will reach that just a little later in my discussion. I have outlined in my mind the order in which I desire to present my argument, and this proposition is injected just now where it does not properly belong.

Mr. LITTLETON. May I ask a question just at this point?

Mr. EMERY. Certainly, Mr. Littleton.

Mr. LITTLETON. Is it not true that the constitutional provision regarding the judicial power of the court was made for the purpose chiefly of declaring that you should never attempt to vest these courts with other than judicial power, that it was not for the purpose of saying Congress might not confer or withhold certain powers and certain governing features of its procedure, but rather to differentiate between executive and legislative and judicial functions, and for the purpose of making it for all time impossible for Congress to confer executive or administrative functions upon courts as courts?

Mr. EMERY. I believe that is one of the many reasons advanced both in the constitutional debates and in the Federalist and in the correspondence of the distinguished men to whom our Constitution owes its being.

Of course, there existed at the time of the adoption of the Constitution a recognition of three separate and distinct branches of government in the constitutions of several of the original States. This is commented on in the Federalist and a list of eight States, I believe, given, in which that distinction was recognized. That section was likewise intended, as is evidenced both from letters and speeches of Madison and Jay and Jefferson, to preserve the independence of the judiciary which, in the course of the English history, had many times suffered trespass from the King.

Mr. LITTLETON. Does it not say in the Constitution that all judicial power shall be vested in a supreme court and inferior courts?

Mr. EMERY. Yes, sir.

Mr. LITTLETON. Is not the emphasis of that proposition to be laid upon the fact that all judicial power, whether little or much, is conferred upon the courts, and it must be all the judicial power?

Mr. EMERY. Surely.

Mr. LITTLETON. It must not be legislative power, or executive power, or administrative power; and is not the emphasis to be placed on the fact that if Congress gives much or little power to these courts, prescribes them narrowly or gives them broad jurisdiction, it must

always preserve the judicial power in that branch of the Government, and is not that the philosophy of that section?

Mr. EMERY. The philosophy, as you have so well expressed it, is, as I understand it, that and something more. There is recognized in the Government of the United States a power distinct from the legislative and the executive, which is the judicial power. That judicial power was not defined. But the phrase denoted something well recognized and established——

Mr. HENRY (interposing). Will the gentleman allow me to interrupt?

Mr. EMERY. Pardon me just a moment, please, Mr. Henry.

As the supreme court of Indiana has well said that the judicial power has no home but in the courts; and it was the purpose, as I understand it, of the Constitution to see that that power, whether little or great, had a secure home in the courts. If that judicial power means something, just as legislative power means something and executive power means something, that thing vested by the Constitution and defined by the courts must be the power that belongs to the judicial branch of the Government and to be violated by no other.

Mr. LITTLETON. That being so, does not the question really arise here whether Congress, having conferred upon a court a judicial power, has the same right to withdraw that judicial power, not conferring it upon any other branch of the Government, but simply withdrawing it, rescinding it, and so regulating it that it shall be conducted by the aid of a jury instead of a court? Does it destroy its character as a judicial power because it provides the additional approval of a jury to aid the court?

Mr. STERLING. Before you answer that——

Mr. EMERY (interposing). Pardon me; let me answer that first.

May I say, Mr. Littleton, that to answer that question compels me to assume something I deny to be a principle or fact, and I will answer that question a little further along in my argument, because I am now virtually laying a foundation. I want to show there are certain essential elements included in the judicial power, and then I will directly answer your question.

Mr. LITTLETON. I hope you will pardon me for interposing the question. I hardly think it fair to interrupt you in this way, I must admit.

Mr. EMERY. Your question involves a very substantial feature of my argument, and I should have to proceed disjointedly rather than consecutively if I undertook to consider it now.

Mr. STERLING. I do not know whether you confuse jurisdiction with power or not. Do you contend there is a distinction?

Mr. EMERY. I insist upon a very marked distinction.

Mr. STERLING. Does Congress confer judicial power? Does Congress do that?

Mr. EMERY. It does not.

Mr. STERLING. Does it not just fix the jurisdiction?

Mr. EMERY. That is all, as I conceive it.

Mr. STERLING. And Congress may go further, not only fixing the jurisdiction of the court, but may prescribe the methods of procedure; but does it confer any judicial power on a court now?

Mr. EMERY. To say that Congress, by abolishing a court, abolishes the judicial power, is to my mind like saying because a man destroys a barrel that holds water he destroys the water. He has abolished the receptacle, but the contents of it remain in existence somewhere, and if all the courts were abolished the judicial power would merely remain dormant in the Constitution, ready to flow into any constitutional receptacle.

Mr. HENRY. I do not want to disturb the line of your argument, but I consider that a very important point made by Mr. Littleton, and I would like to make this suggestion:

In the very first article of the Constitution it is said:

All legislative power herein granted shall be vested in Congress.

It uses the expression "legislative power." The second article says:

The executive power shall be vested in the President of the United States of America.

Then the third article says:

The judicial power of the United States shall be vested in a Supreme Court and inferior courts.

So it uses identically the same expression—first, legislative, then executive, and then judicial powers; so I think for that reason the proposition made by Mr. Littleton is very important in considering the point you are discussing now.

Mr. EMERY. You call my attention to it, but I do not quite catch the connection between your suggestion and Mr. Littleton's question.

Mr. HENRY. The suggestion is that the phrase is identically the same. As I understand your argument, you were making the point that whenever the judicial power is once vested in a court, it carries with it all judicial power, as I understood, when the Constitution was adopted, being possessed by the courts, and could not be limited in any way.

Mr. EMERY. The gentleman is not confusing—pardon me for using the term—jurisdiction and judicial power?

Mr. HENRY. No, not at all.

Mr. EMERY. My proposition is not that Congress can not abolish the courts——

Mr. HENRY (interposing). I understand that.

Mr. EMERY (continuing). Which it has ordained and established. My proposition is that not Congress but the Constitution vests in the inferior courts of the United States the judicial power which they exercise. It flows directly from that section of the Constitution creating the judicial power and not from the Congress which establishes the tribunal in which it is exercised.

The CHAIRMAN. Right in that connection, you say the power flows directly from the Constitution to the courts. Can not Congress prescribe the amount of power that shall flow? Can not Congress limit the power that shall flow?

Mr. EMERY. Undoubtedly, by the very manner in which it provides the procedure.

The CHAIRMAN. Do you mean to say that all the power that a court might possibly have under the Constitution, when the act of Congress calls that court into being, by the very act creating the court, that

all constitutional powers flow into the court and it is not within the power of Congress to restrict the power that flows into the court?

Mr. EMERY. No, sir. I recognize fully the regulative power of Congress, but when that regulative power reaches a point where it impairs or destroys an essential judicial function it has passed the limit of its authority; and the legislative power trespasses upon the judicial power and mutilates its essential features conferred by the Constitution.

The CHAIRMAN. Congress has created a Court of Customs Appeals, and it has limited the powers of that court. Congress has created a Commerce Court, and it has limited the powers of that court. You do not contend, do you, that Congress in creating a court can not limit the powers of that court which they create?

Mr. EMERY. The Court of Customs Appeals, like the Court of Claims——

The CHAIRMAN (interposing). I am not referring to the question of jurisdiction. I am inquiring with reference to the matter of power.

Mr. EMERY. It can undoubtedly limit the things to which the court shall apply its power, the space within which it shall apply it, and the time during which it shall apply it. But I say that the essence of judicial power can not be taken from a court by Congress where Congress has given it jurisdiction; that with reference to whatever it has been given jurisdiction by an act of Congress the judicial power applied can not be impaired by Congress. I mean by that the power to hear and decide and enforce its decrees.

I can not, for instance, conceive any court of any kind that Congress could create, which, after it had been given jurisdiction of the subject matter, could by statute be told how it should decide its cases.

Mr. NORRIS. Suppose you grant to an inferior court the right to issue an injunction or restraining order; it would be within the power of Congress to take that right away, would it not? There would not be any question about that. Suppose we create a court of equity which, under the power mentioned in the Constitution, would have the right to issue an injunction; could we provide by law that such a court should not issue an injunction? Would that be unconstitutional?

Mr. EMERY. I am perfectly willing to answer that question, but, as I said with reference to another, it compels me to come at once to something I would like to defer until a little later.

Mr. NORRIS. I will withdraw the question for the present, then.

Mr. DODDS. Is it not your contention that the legislature has the right——

Mr. EMERY (interposing). The judicial power is a certain fixed thing. I say that power in its essence does not proceed from Congress, but flows from the Constitution of the United States into what have been defined as constitutional courts as distinguished from legislative courts.

I am anxious to be at the service of the committee to answer any question that arises, but unless I lay my foundation a little deeper, Mr. Chairman, I will be compelled to repeat myself; and if the chairman will permit me to proceed a little further without interruption, I will be perfectly willing to answer any question the committee asks.

The CHAIRMAN. That is a fair request, certainly.

Mr. EMERY. I desire to call the attention of the committee, furthermore, in the discussion of judicial power, to a great decision of the late Mr. Justice Brewer, which deserves consideration in connection with the discussion of judicial powers. It is contained in the case of Kansas against Colorado, 206 United States, page 31.

The first question there discussed was whether or not the court had jurisdiction to hear a controversy between those two States with respect to the subject matter. Mr. Justice Brewer calls attention to the very remarkable condition respecting the grant of judicial power. He compares the manner in which the Constitution grants legislative and judicial powers and contrasts the two grants of power. It is a very important consideration in this very discussion.

Mr. Justice Brewer said:

In the Constitution are provisions in separate articles for the three great departments of Government—legislative, executive, and judicial. But there is this significant difference in the grants of powers to these departments: The first article, treating of legislative powers, does not make a general grant of legislative power. It reads:

"All legislative powers herein granted shall be vested in a Congress," etc.

And then, in article 8, mentions and defines the legislative powers that are granted. By reason of the fact that there is no general grant of legislative power, it has become an accepted constitutional rule that this is a government of enumerated powers.

In McCulloch *v.* Maryland (4 Wheat., 405, 4 L. Ed., 601) Chief Justice Marshall said:

"This Government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted."

On the other hand, in Article 3, which treats of the judicial department—and this is important for our present consideration—we find that section 1 reads that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." By this is granted the entire judicial power of the nation. Section 2, which provides that "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States," etc., is not a limitation nor an enumeration. It is a definite declaration—a provision that the judicial power shall extend to—that is, shall include—the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial power. There may be, of course, limitations on that grant of power, but, if there are any, they must be expressed, for otherwise the general grant would vest in the courts all the judicial power which the new nation was capable of exercising. Construing this article in the early case of Chisholm *v.* Georgia (2 Dall., 419, 1 L., ed. 440), the court held that the judicial power of the Supreme Court extended to a suit brought against a State by a citizen of another State. In announcing his opinion in the case, Mr. Justice Wilson said (p. 453, L. ed., p. 454):

"This question, important in itself, will depend on others more important still, and may, perhaps, be ultimately resolved into one no less radical than this: Do the people of the United States form a nation?"

In reference to this question attention may, however, properly be called to Hans *v.* Louisiana (134 U. S., 1, 33 L. ed, 842, 10 Sup. Ct. Rep., 504).

The decision in Chisholm *v.* Georgia led to the adoption of the eleventh amendment to the Constitution, withdrawing from the judicial power of the United States every suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or citizens or subjects of a foreign State. This amendment refers only to suits and actions by individuals, leaving undisturbed the jurisdiction over suits or actions by one State against another. As said by Chief Justice Marshall in Cohen *v.* Virginia (6 Wheat., 264, 407, 5 L. ed., 257, 291): "The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States." See also South Dakota *v.* North Carolina (192 U. S., 286, 48 L. ed., 448, 24 Sup. Ct. Rep., 269).

Speaking generally, it may be observed that the judicial power of a nation extends to all controversies justiciable in their nature, and the parties to which or the property involved in which may be reached by judicial process, and when the judicial power of the United States was vested in the Supreme and other courts, all the judicial power which the Nation was capable of exercising was vested in those tribunals; and unless there be some limitations expressed in the Constitution it must be held to

embrace all controversies of a justiciable nature arising within the territorial limits of the Nation, no matter who may be the parties thereto. This general truth is not inconsistent with the decisions that no suit or action can be maintained against the Nation in any of its courts without its consent, for they only recognize the obvious truth that a nation is not, without its consent, subject to the controlling action of any of its instrumentalities or agencies. The creature can not rule the creator. (Kawananakoa *v.* Polyblank, 205 U. S., 349, ante, 834; 27 Sup. Ct. Rep., 526.) Nor is it inconsistent with the ruling in Wisconsin *v.* Pelican Insurance Co. (127 U. S., 265, 32 L. Ed., 239; 8 Sup. Ct. Rep., 1370), that an original action can not be maintained in this court by one State to enforce its penal laws against a citizen of another State. That was no denial of the jurisdiction of the court, but a decision upon the merits of the claim of the State.

These considerations lead to the proposition that when a legislative power is claimed for the National Government the question is whether that power is one of those granted by the Constitution, either in terms or by necessary implication; whereas, in respect to judicial functions, the question is whether there be any limitations expressed in the Constitution on the general grant of national power.

Mr. DAVIS. Does that mean the National Government is a Government of delegated power, or does it mean——

Mr. EMERY (interposing). That means, Mr. Chairman, what Justice Brewer said, that the rule by which to discover whether or not a power exists in Congress is to ascertain whether it has been expressly granted or not, whereas if it is judicial power it is presumed to exist in the judiciary of necessity unless there is express limitation stated in the Constitution. This does not apply to the jurisdiction of the court, but to the power of the court as distinguished from jurisdiction.

Mr. WILSON. Does that mean that all the powers which are not specifically granted are reserved to the States and the people and do not apply to the courts of the United States?

Mr. EMERY. I do not see the bearing of your question, sir; but I think the effect of Mr. Justice Brewer's decision is this: He simply says, "All the judicial power." Not every power of the Government, but the judicial power of the Government, which has a certain fixed and definite meaning, is vested in the courts of the United States, except where there is limitation to the contrary expressed in the Constitution.

Mr. WILSON. If I understand the construction you are endeavoring to place upon——

Mr. EMERY (interposing). I will state the construction, then you will not misunderstand me. The only construction placed upon it is that the legislative power was conferred in a limited sense through enumerated powers upon the Congress of the United States, and to ascertain whether or not the Congress possesses any particular legislative power we must ascertain whether or not it is expressly conferred; but, on the other hand, if we want to ascertain whether or not any judicial power has been withheld from the judicial department of the United States we must find an express limitation in the Constitution.

Mr. WILSON. That is what I understood to be your interpretation; but that therefore that clause of the Constitution provides that those powers which are not specifically named are reserved to the States and the people and do not apply to the courts of the United States.

Mr. EMERY. We are discussing the judicial power of the National Government alone.

Mr. WILSON. That is what I am interested in.

Mr. EMERY. Of course the judicial power of the States has nothing to do with that consideration.

Mr. WILSON. But this is a clause in the Federal Constitution that I have reference to. I do not know that I am putting it exactly, but it provides that all powers which are not specifically granted—and that means granted both to the legislative, the executive, and the judicial powers, as I understand it—are reserved to the States and the people.

Do you assume, as an interpretation of this, that that limitation is waived as it applies to the judicial part of the Government?

Mr. EMERY. I do not see the connection between them at all, Mr. Wilson, I must confess. If you will just allow me to proceed, I may make my meaning more clear to you as I advance.

Mr. NYE. I understood from your argument and the logic of your argument that the answer to that would be that as to judicial powers there is nothing reserved in the Constitution to the people.

Mr. EMERY. Not with respect to the Federal judiciary; that is all I am speaking of. The people granted all the judicial power of the National Government to be exercised through the tribunals named in the Constitution; and when you want to ascertain whether or not there is a reservation on that power you must discover the limitation; otherwise it is——

Mr. WILSON (interposing). Does it not also specify that those powers which are granted shall extend to certain things?

Mr. EMERY. Yes, sir.

Mr. WILSON. And proceeds to define what those certain things are?

Mr. EMERY. Yes, sir.

Mr. WILSON. Would not that constitute a limitation? It defines the extent to which these powers may go or the field into which those powers may extend.

Mr. MCCOY. Is this inherent power a power to apply the law, or is it also an inherent power to find the facts in any particular way?

Mr. EMERY. I am just approaching that proposition now, Mr. McCoy.

The judicial power is understood to extend, under the Constitution of the United States—that is, the judicial power exercised by courts of the United States—to all matters in law and in equity. The Constitution did not endeavor to define what it meant by matters in law and equity. At the time of its adoption, those terms had a meaning fixed from time immemorial, and when the interpreters undertook to say what was meant by proceeding in law or in equity, they examined the meaning which had been given those terms in the common law and equity jurisdiction of England, and they found their answer there.

As was said by the Supreme Court of the United States in the case of Pennsylvania *v.* Wheeling & West Virginia Bridge Co., in Thirteenth Howard 563, a decision by Mr. Justice McLein, the powers in equity to be possessed by the courts of the United States are those powers exercised by the high court of chancery in England, and this, he said, may be considered "the common law of chancery."

Again, in the case of McConehay *v.* Wright (121 U. S.), the same subject was broadly considered by the court, when it was undertaken to ascertain the test of equity jurisdiction in the Federal courts. The court there said:

> While the equitable jurisdiction of the national courts is derived solely from the United States Constitution and statutes, it is identical or equivalent in extent with that possessed by the English high court of chancery at the time of the revolution.

Pomeroy, volume 1, Equity Jurisprudence, section 294, says:

The judicial functions of the English court of chancery are held to have been conferred en masse upon the national jurisdiction.

Therefore the power in equity and at the common law possessed by the courts of the United States are to be defined in the terms of those powers as they existed in the courts of England at the time of the adoption of the American Constitution. The same definition was recognized with respect to the exercise of the same powers by the colonial courts, so far as they were not expressly limited by the colonial charter.

So this proposition arises: What was and what is the judicial power in equity and at the common law which was conferred upon these courts by the Constitution, since it is to them we are to look for this definition?

We need not discuss all of the powers of such courts, but we do want to ascertain whether or not any function or essential power of such courts identified by the long line of English and American decisions as inherent or essential or incidental to the judicial power itself, is destroyed or impaired by the bill here proposed.

Mr. WEBB. May I ask if section 725 of the Revised Statutes is an impairment?

Mr. EMERY. I will discuss the interpretation of that statute by the Supreme Court in a number of decisions in just a few moments, if you will permit me to make this other statement first.

Mr. WILSON. Just in this connection——

Mr. EMERY (interposing). But, Mr. Wilson, pardon me; just let me proceed. I am trying to finish this fundamental proposition. I am asked questions that lead me into a very advanced stage of my argument, and I very much prefer to present it in its proper order.

Mr. WILSON. But I desire to ask a question in connection with the proposition just suggested.

If the equity powers held by the chancery courts of England at the time of the adoption of the Constitution were transferred by the Constitution to the Supreme Court, were the limitations of that chancery power also transferred to the Government?

Mr. EMERY. I do not suppose you mean the Supreme Court alone?

Mr. WILSON. To whatever courts there are.

Mr. EMERY. I should assume they would be, except where there was a constitutional or valid statutory provison regulating their exercise.

Mr. WILSON. Is it not a fact that one of the limitations of the chancery courts of England at the time of the adoption of our Constitution was the power of Parliament to change its jurisdiction and power?

Mr. EMERY. Are you undertaking now to suggest that there was a transfer to the courts of the United States of legislative power existing in the Parliament of England? Your question reaches beyond Congress. It reaches to the difference between two forms of government.

Mr. WILSON. I am simply seeking to convey this point, that if there was transferred to the courts of the United States the power of the chancery courts of England, it must have been transferred at the same time as the limitations of those chancery courts, and one of those

limitations was the power of Parliament to change its powers and jurisdiction.

Mr. EMERY. Your proposition might be true, Mr. Wilson, if the Constitution had said "the powers of the Supreme Court and other courts of the United States shall be those possessed by the chancery or common-law courts of England, subject to the same limitations which the English Parliament possessed residing in the Congress of the United States." But all the Constitution can be said to mean, in the light of its interpretation, is that we look for the definition of the terms employed in the Constitution to a jurisdiction with which we were familiar.

The legislative powers of Congress are defined by the Constitution. They were not carried into the Constitution by reference to the legislature of any other country.

Some of the powers exercised by our judiciary were utterly unknown to England, as you well know. It is not within the power of any court of England to declare a law unconstitutional or invalid. Parliament at once makes the laws and amends the constitution, because every change in the law of England is assumed to be a corresponding change in its constitution.

Mr. HENRY. In view of what you have said about the equity powers of the courts, I want to ask if, in your opinion, Congress has the power to take away from the circuit and district courts of the United States the right of issuing a writ of injunction?

Mr. EMERY. Leaving them in existence, but with that right withdrawn?

Mr. HENRY. Yes.

Mr. EMERY. I do not think so.

Mr. HENRY. You think, then, Congress would have no power to limit that right?

Mr. EMERY. Not to limit it. There is quite a difference between destroying a power and regulating it.

Mr. HENRY. You do take the position that Congress can not take away from the circuit and district courts of the United States the right of issuing writs of injunction?

Mr. EMERY. Yes; it can not take it away.

Mr. HENRY. I just wanted to raise the issue and have your opinion.

Mr. EMERY. I am sorry to simply answer you in that way. I should prefer to say why, but that would take too long.

The issue raised here is whether or not, as an essential feature of the judicial power, there exists in the courts of the United States, not by virtue of any statute, but by virtue of the fact that they are courts exercising judicial power, an inherent right to protect themselves and enforce their orders. I say this is to be determined in the first place by reference to what was the power possessed in that respect by the equity or common law courts of England, and therefore, by definition, in the courts of the United States.

We find that Mr. Chief Justice Wilmot, one of the most distinguished of the great English judges and common-law authorities, says—I am reading, if the committee please, from the Eleventh Oklahoma Reports, at page 108, where this citation is quoted:

> The power which the courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt acted in the face of the court; and the issuing of attachments by the supreme court of

Justice in Westminster Hall for contempts out of court stands on the same immemorial usage which supports the whole fabric of the common law. It is as much the lex terre and within the exception of Magna Charta as the issuing of any other legal process whatsoever. I have examined very carefully to see if I could find out any vestiges of its introduction, but can find none. It is as ancient as any part of the common law. There is no priority or posteriority to be found about it. It can not therefore be said to evade the common law. It acts in alliance and friendly conjunction with every other provision which the wisdom of our ancestors have established for the general good of society. Truth compels me to say that the mode of proceeding by attachment stands upon the very same foundation as trial by jury. It is a constitutional remedy in particular cases, and the judges in those cases are as much bound to give an activity to this part of the law as to any other.

And that statement of Mr. Justice Wilmot has been again and again quoted with approval as the foundation of decisions by the State courts of the United States and by the Supreme Court of the United States; so it can be said to be a recognized expression of the power courts of equity and common-law courts have exercised from time immemorial, with respect to contempts committed against them.

It is not necessary, of course, to assume that all the powers possessed by the common-law and equity courts of England in the punishment of contempts exist in the courts of the United States by virtue of their exercising common-law and equity powers, because our Constitution has limitations and guaranties which forbid, perhaps, some of the forms of its exercise in England.

That is referred to by Mr. Justice Scott in Neel *v.* State (4 English, 263), where he said:

> It has never been contended in this country that the common law, although it is our birthright, and in force among us, without express recognition of our Constitution and laws, was ever actually enforced in all its length and breadth, but only to an extent that was not wholly inconsistent with these great principles upon which our free institutions, purely American, have been reared and maintained.
>
> So these doctrines which we are considering (powers of courts to punish contempts) in being recognized by the courts must be regarded as having received a corresponding abatement of those of its lineaments which are at open war with the nature and character of our Constitution, and the actual state of things among us, under its legitimate operation, or it would be an exotic that could not germinate in our soil.

The regulation of the court's power by legislation is thus described by the supreme court of West Virginia, which says (State *v.* Frew & Hart, 24 W. Va.):

> Therefore, courts will tolerate the regulation of the power, so that the legislature does not by such regulation substantially destroy the efficiency of the court.

The CHAIRMAN. Was that a case where the contempt was committed in the presence of the court?

Mr. EMERY. No, sir; the contempt occurred through the publication, in advance of a decision, of an article by a newspaper stating that three members of the court had attended a convention and agreed in caucus to decide the case in favor of their party, they being members of the party.

Such is the foundations of the power to punish for contempt, and such is the recognition of its limitations in well-considered American decisions on that subject.

But it has never been held anywhere, either in the Supreme Court of the United States or in a court of last resort of any State, that the right of the court to be the sole investigator of a contempt of its authority, committed in its presence or against its order or decree, whether by an officer of the court or another, could be taken away from it, or that that power of investigation could be transferred to

another tribunal, whether a jury or a judge, or that in the ascertainment of the fact as to whether or not a contempt had been committed a court of equity or a court of common law could be compelled to accept a jury's conclusion with reference to the facts. I assert very positively that not only has that doctrine never been recognized by any court of last resort in the United States where the issue was squarely before it, but, on the contrary, it has been condemned repeatedly throughout our jurisdiction, and that condemnation has followed every attempt on the part of any legislature to take from the court its power to be the sole judge of the commission of the contempt and to vest it either in another judge or in a jury. Not only have State courts uniformly so held, but the right to trial by jury in contempt cases has been denied by the Supreme Court of the United States repeatedly, and the court has expressed wonder that anyone should suggest that it was ever a part of the common law of England. That court has likewise decided that it was not a denial of due process of law to refuse a person accused of contempt a trial by jury.

Nay, more. The Supreme Court of the United States and the courts of the various States have repeatedly upheld the exercise of the chancellor's power to punish as a contempt in the enforcement of a police regulation of the State the doing of those things which our friend, Mr. Wilson, representing organized labor, says mean the trial of a man for a criminal act under the guise of enforcing an injunction.

Lawyers are all familiar with those cases where, in the State of Iowa and other States of the Nation, it has been declared unlawful for a person to manufacture or sell liquor and any citizen has been authorized to bring an injunction suit to restrain the manufacture or sale of liquor on certain premises. After the issuance and disobedience of the order, under the power to punish for contempt the man selling the liquor has been attached for violating the injunction and thus been punished, as some might say, for selling liquor as a contempt of court——

Mr. WILSON (interposing). But, Mr. Emery——

Mr. EMERY (interposing). Pardon me. The contemner was not punished for selling the liquor, of course; he was punished for violating the injunction. But the gentlemen who say that a union man, for instance, is improperly treated when he is punished for violation of an injunction, say that under these circumstances the man is deprived of the opportunity to be tried by jury in what is a criminal proceeding.

In these cases all these liquor dealers in different parts of the United States have been punished, if you want to speak of it in terms of the actual offense which the law intended to prevent, for unlawfully selling or manufacturing liquor; but the form by which the State undertook to enforce its authority to declare and abate a public nuisance was by a proceeding in equity, and the punishment which was levied upon the individual was for a contempt of an order the court was authorized to make, and it was for that, and that alone, he was punished. I refer as authority on this subject to the opinion in Eilenbecker *v.* Plymouth County (134 U. S., p. 31).

To return from the illustration, I say that, so far as the courts of the United States and the States are concerned, they have denied from the very beginning of our Government the right of the legisla-

ture to take this power of being the sole investigator of its contempts from it, and they have asserted, from the very beginning of our Government, the fact that there exist in the courts of the United States inherent powers that did not arise from any legislation establishing or ordaining them, and these powers, essential to the administration of justice and the performance of their judicial function, could not be impaired or destroyed by the legislative branch of the Government, although within reasonable limits they could be regulated; but any attempt to take from them the power to punish their own contempts or to solely investigate the fact as to whether or not a contempt had been committed was, under the guise of regulation, a destruction or impairment of the judicial power.

The CHAIRMAN. Would it interrupt you, Mr. Emery, to make this suggestion, that none of these bills which the committee have before them takes away from the courts the power to punish for contempts? These bills all contemplate that contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice or disobedience of an order of the court by any of the officers of the court, shall be punished by the court summarily without the intervention of a jury; but in certain cases of contempt, called in most of these bills "indirect contempt," and in some of these law books referred to as "constructive contempt," that power to punish for contempt shall still be in the court, but it regulates the manner of ascertaining the guilt or innocence of the accused, whether he has been correctly accused or wrongfully accused; and it merely regulates the manner of ascertaining that question of fact but does not undertake to take away from the court the power to punish for contempt.

Mr. EMERY. I understand that. It takes from the court the power to be the sole judge as to whether or not a contempt was committed, and says the person accused of that kind of a contempt shall be entitled, at his request, to a jury, who shall pass upon the question whether or not he committed the contempt charged.

That is precisely what occurred in Virginia in 1899, and is discussed in Carter's case, in Ninety-sixth Virginia, 808. I refer to this as a general authority on the proposition I have laid down. They are answering the very objection which the chairman has just so well propounded. There the court said:

> It was contended by counsel for plaintiff in error that, inasmuch as the act of 1897–8 merely transferred the punishment of contempts from the court to a jury, and even made acts punishable as contempts not embraced within the act of 1830–31, it was not obnoxious to the objection that it interfered with or diminished the power of the court to protect itself.
>
> To this view we can not assent. It is not a question of the degree or extent of the punishment inflicted. It may be that juries would punish a given offense with more severity than the court, but yet the jury is a tribunal separate and distinct from the court. The power to punish for contempts is inherent in the courts, and is conferred upon them by the constitution by the very act of their creation. It is a trust confided and a duty imposed upon us by the soveriegn people which we can not surrender or suffer to be impaired without being recreant to our duty.

Mr. WEBB. They did not take away from the court the power to punish?

Mr. EMERY. The statute provided a man should not be fined more than $50, or given more than 10 days in jail, unless he had a jury trial. Of course it does not make any difference whether the jury was to fix the amount of the punishment or not.

The CHAIRMAN. It seems from the decision you have just quoted that the power to fix the quantum of punishment was conferred upon the jury, and that the court in Virginia predicated its objection to the statute upon the idea that the measure of punishment was to be left to the jury; whereas, these bills now before the committee merely regulate the process by which the guilt or innocence of the accused is to be ascertained, leaving the punishment within the power and discretion of the court.

Mr. EMERY. I will show you other decisions that drive right straight at the proposition here.

Mr. STERLING. Did that State statute expressly relate to contempts, Mr. Emery?

Mr. EMERY. Yes, sir. The question is stated here by the court as follows:

> It is incumbent upon us to consider whether it was within the power of the legislature to deprive the court of jurisdiction to punish it without the intervention of a jury.

It did not make any difference whether the jury was to fix the amount of the penalty or not. The proposition upon which the court was passing, and which he says is the vice of it, is the interposition of the jury between the judge and the investigation of the commission of the contempt.

Mr. LITTLETON. Does he not mean in this wise, that the court, through an act of the legislature, can not be compelled to part with the power to punish contempts, and that the act of the legislature attempted to divorce that power from the court entirely and lodge it with the jury, as distinguished from these measures before the committee, which seek to make the jury the triers of the question of fact, but in no wise divorce from the court the power to punish upon a return of the trial upon those facts?

Mr. EMERY. Would the gentleman from New York contend that it was within the power of the Congress of the United States or any State legislature to say to a chancellor, in an equity proceeding, that he had to take a jury to ascertain the facts at issue and was bound by the finding of that jury?

Mr. LITTLETON. If that equitable proceeding involved the destruction of life or liberty of an individual I should say the supervening power of the Constitution to protect life and liberty would authorize them to do so.

Mr. EMERY. It would not make any difference whether incidental to the violation of an injunction a crime was committed. There is another tribunal to punish that, as the court said in the Debs case.

But does anyone contend that, quite apart from the question of trial by jury in contempt cases, where the proceeding is equitable in its nature and is a proceeding in equity to enforce a decree which the court has made in equity, the chancellor at any stage of the proceeding can be in conscience bound by the findings of a jury as to questions of fact?

Mr. LITTLETON. On the question you raised a moment ago, is not this true, that it can not be possible the administration of criminal law or punishment of violence can ever, under this Government, be lodged with the equitable branch of the Government, to be administered through the thin guise of an injunctive process, such as in the case you cited in Iowa, where an injunction might be issued against a whole community, saying they should not commit certain offenses, and then

the right to be properly tried for the commission of this offense, which has long since been guaranteed to them, should be taken away under an injunctive process and they be summarily committed because they violated the injunctive process of the court?

Mr. EMERY. The court in the Debs case said that wherever an injunction was violated, the court in enforcing the injunction "by proceeding in contempt is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to." A man may violate an injunction—for instance, in the Standard Oil or the Tobacco case, one of the defendants might resist an officer, and in the resistance of that officer he might commit an assault. The court who tried him for violation of the injunction would have nothing whatever to do with the assault as a crime, and would not punish for the assault but for violation of its order, and some other tribunal would take cognizance of the incidental crime committed.

Mr. LITTLETON. Do you think, with reference to that Iowa proposition which you stated, that the issuance of an injunction against a liquor man for violating the excise law ought to enable the court to bring him up for violation of the injunction and commit him, and thereby try him practically for violation of the excise law, an ex parte commitment?

Mr. EMERY. It is not an ex parte commitment, Mr. Littleton.

Mr. STERLING. I do not think it is punishment for the sale of liquor that the injunction is issued. The injunction is issued to prevent the sale. If he sold it, then he could be punished for disobedience of the injunction.

Mr. EMERY. The proposition is simply this: It is within the power of the State to declare the sale or manufacture of liquor or other intoxicants a public nuisance. If it is within its power to say it is a nuisance, it is within its power to use either its law or equity powers to enforce the abatement of the nuisance. In this proceeding in equity, having declared it to be a nuisance to sell it and having forbidden its sale, and giving every citizen the right to bring an action in equity against the person who did manufacture or sell it and restrain him from doing so, it was simply using its powers in equity as well as in law to enforce the rights of the public as it had declared them.

Mr. LITTLETON. Is not this a departure from the traditional use of the injunction? Is not this so-called institution of the writ of injunction in the labor troubles since 1854 a departure from the traditional use of the writ of injunction?

Mr. EMERY. I do not think so. I do not think there is any ground for the statement or the suggestion, so far as the practices of the courts are concerned. The principles involved are as old as the injunctive writ.

The court in the Carter case, which I was discussing, goes on to say—and this sums up its conclusion and my proposition.

In the courts created by the Constitution there is an inherent power of self-defense and self-preservation; that this power may be regulated but can not be destroyed or so far diminished as to be rendered ineffectual by legislative enactment; that it is a power necessarily resident in and to be exercised by the court itself, and that the vice of an act which seeks to deprive the court of this inherent power is not cured by providing for its exercise by a jury; that while the legislature has the power to regulate the juris-

diction of circuit, county, and corporation courts, it can not destroy, while it may confine within reasonable bounds, the authority necessary to the exercise of the jurisdiction conferred.

(At this point there was a call of the House.)

The CHAIRMAN. Please suspend a moment, Mr. Emery. There is a call of the House, and it is necessary that we go at once to the House.

Suppose we meet here Monday. Would 10.30 Monday morning suit the members of the committee? Mr. Emery can then continue at that hour. If there is no objection, that will be done. [After a pause.] There being no objection, the committee will adjourn until Monday morning next at 10.30 o'clock.

(Thereupon, at 12 o'clock noon the committee adjourned until Monday, December 11, 1911, at 10.30 o'clock a. m.)

MONDAY, DECEMBER 11, 1911.

The committee met at 10.30 o'clock a. m., Hon. Henry D. Clayton, chairman, presiding.

STATEMENT OF JAMES A. EMERY, ESQ.—Continued.

The CHAIRMAN. The committee will be in order, and Mr. Emery will continue his statement. The committee took a recess Saturday until 10.30 o'clock this morning, for the purpose of having Mr. Emery complete his statement.

Mr. EMERY. Mr. Chairman, and gentlemen of the committee, during the course of my discussion of the measure before this committee on last Saturday, I undertook to show that the judicial power of the United States was lodged by the Constitution in a separate and distinct branch of the Government; that it was vested in one Supreme Court and such inferior tribunals as were established and ordained by the Federal Congress; that the judicial power was not defined in the Constitution, but was recognized as a thing well understood and established, and it was defined by reference to the judicial power possessed by courts of common law and chancery in England. It therefore became necessary to ascertain whether the power to investigate the commission of a contempt, and to define it, was an inherent judicial power arising from the very nature of the judicial function itself and not conferred by any legislature. To this end I undertook to call the committee's attention to the fact that, by a long line of English authorities, including Mr. Justice Wilmot and the great commentators and judges of English courts, from time immemorial, the right of a court to protect itself from insult and to enforce its decrees by a proceeding in contempt, was recognized as incidental to the judicial power.

At the time of adjournment I was calling the attention of the committee to the fact that this principle, the right to say what a contempt is and to exclusively examine into the question of fact as to whether or not it has been committed, is recognized as an incident of the judicial power by the courts both in the States and the United States, a power not to be separated from it nor impaired by act of legislature; although subject, within reasonable limitations, to the regulation of the legislature.

Just at the outset permit me to call the attention of the committee again to the fact that the investigation of an alleged contempt is a mixed question of fact and law and not a question of fact alone. This was pointed out in the most convincing way by the great Chief Justice Taney himself in the case of Wartman *v.* Wartman, in Taney's Reports, page 362, where he says:

> As regards the question whether a contempt has or has not been committed it does not depend upon the intention of the party, but upon the act he has done. It is a conclusion of law from the act; disobedience to the legitimate authority of the court is by law a contempt, unless the party can show sufficient cause to excuse it.

As to the union of the two things, the judicial power and the jurisdiction, illustrating their complementary practical relationship. I beg also to incidentally call your attention to the case of Mayor *v.* Cooper (6 Wallace, 252), where the explanation is so clearly made that it seems to bring very plainly to the mind the relationship between the flow of the judicial power from one source and the conference of jurisdiction from another. In that case the court say:

> As regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it. It is the duty of Congress to act for that purpose up to the limits of the granted power. They may fall short of it, but can not exceed it. To the extent that such action is not taken the power lies dormant. It can be brought into activity in no other way.

This seems to clearly point out the proposition advanced and suggested as the foundation upon which this argument must necessarily rest, that it is within the power of Congress, as it is within the power of the legislature of a State, with reference to a constutitional court, to partially fix the quantity of power that may flow, but not its quality, which is fixed in the organic instrument itself; a clear and definite distinction is thus observed between the judicial power created by the Constitution and the jurisdiction created in every given case, by the act of Congress, except with respect to the original jurisdiction of the Supreme Court.

Yesterday I advanced the proposition that all of the State courts of the United States before which the question has been presented have recognized that there exists in the courts of the State, and under the national Constitution there is in the courts of the United States—and I refer now to constitutional courts alone—inherent powers arising from the nature of their being and which contribute to make them a distinct, separate, coordinate branch of the Government; and that as a result of this wherever in the States language similar to that found in the Constitution of the United States has vested the judicial power everywhere State courts of the highest authority, through a long term of years, have uniformly held that it is not within the power of the legislature to abridge, impair, or destroy the power of the judiciary to protect its dignity and enforce its decree in a contempt proceeding by preventing it from originating and carrying on the investigation as to whether or not a contempt has been committed and whether or not the thing done was, as a matter of law, a contempt. It has even been further held by the State courts that constitutional courts of that character could not have their power to punish a contempt limited by a statutory definition which prevented them from punishing anything which was in itself a contempt.

I believe Georgia and Louisiana are the only two States in the Union in which the power to limit punishment in contempt cases has been expressly conferred by the constitution. In the constitution of Georgia there is a clause that the power of the courts to punish for contempt shall be limited by legislative acts, Article I, section 1, paragraph 20. Under that constitutional provision it was held in a proceeding for contempt that it did not confer upon the legislature the right to determine what acts shall constitute contempt, but only the power to prescribe the punishment therefor. (Bradley *v.* State, 111 Ga., 168.)

Beginning with such distinguished decisions as that by the Supreme court of Pennsylvania, in 1788, in the Oswald case, 1 Dallas, a decision rendered during the critical period, so called by the historian John Fiske, between the end of the Revolutionary War and the adoption of the Constitution, we find a recognition of these two propositions by the Supreme Court of Pennsylvania, that it is an inherent power of a court of at least the superior character to investigate the contempts committed against it, and to decide whether or not the thing committed is a contempt; and that the denial of the right of jury trial in a contempt case is not a violation of the constitutional provision requiring jury trial in common-law cases.

Then there is the well-known and constantly cited case of Middlebrook *v.* State (43 Conn., 257). It was there held respecting a statute defining contempts:

> The statute is not to be regarded as conferring the power to punish for contempts, but merely as regulating an existing power. The power is inherent in all courts.

Said the chief justice:

> But independently of the statute, we think the power is inherent in all courts. The court of justice must of necessity have the power to preserve its own dignity and to protect itself.

These are merely types of numerous older decisions.

I called the attention of the committee the other day to Carter's case, in 96 Virginia, and the case of State *v.* Frew & Hart (24 W. Va., p. 416), and the case of Smith *v.* Speed (11 Okla., 61), as cases in which the court was called upon to meet the very proposals of this bill. In Carter's case the act of the legislature under which the court was called upon to exercise judgment provided, in language very similar to the bill now under consideration, for a distinction between so-called direct and indirect contempts, and finally that if the accused answered, "trial shall proceed according to the rules governing the trial of criminal cases," precisely as in this bill. The act of the Legislature of Virginia quoted in that case provided in part as follows:

> After the answer of the accused, or if he fail or refuse to answer, the court may proceed at the time so fixed to hear and determine such accusation upon such testimony as shall be produced. If the accused answer, the trial shall proceed according to the rules governing the trial of contempt cases, and the accused shall be entitled to compulsory process for his witnesses and to be confronted with the witnesses against him.
>
> Such trial shall be by the court, or, upon the application of the accused, a trial by jury shall be had, as in any case of a misdemeanor.

The point raised in this case was that the court had refused to grant the respondent a trial by jury on citation for contempt, as the respondent demanded.

Mr. DAVIS. Before what court was it tried?

Mr. EMERY. It was a circuit court of the city of Lynchburg which issued a rule against Carter, the plaintiff in error, to appear before it on the first day of the next term and show cause why he should not be fined and attached for contempt.

Mr. GRAHAM. What was the statutory provision in that State on that question?

Mr. EMERY. I have just read it. There was a definition of direct and indirect contempts, and then, in the subsection, a proceeding was provided for cases of indirect contempt, and finally as I have read, "that if the accused answer," and so forth. Of course, the objection I am making does not apply in cases where the accused either pleaded guilty or where he did not demand a jury trial. But in the act of the Virginia Legislature it was provided:

If the accused answer, the trial shall proceed according to the rules governing the trial of criminal cases, and the accused shall be entitled to compulsory process for his witnesses and to be confronted with the witnesses against him.

Such trial shall be by the court, or, upon the application of the accused, a trial by jury shall be had, as in any case of a misdemeanor.

Thus, the legislature of Virginia gave the respondent the right to a trial by jury in a contempt case, which the court refused to recognize, and thus the issue raised was whether or not it was within the power of the legislature of Virginia to compel a court to accept a jury to ascertain whether or not a contempt had been committed.

Mr. HOWLAND. What was the act charged as the contempt?

Mr. EMERY (reading):

To appear before it on the first day of the next term to show cause why he should not be fined and attached for contempt, by attempting to obtain a continuance of the action of Grubbs against Carter by means of false telegrams. In answer to this rule he appeared and stated that he is a resident of the county of Nottoway, and that, having received a telegram from his attorney, J. Emory Hughes, that his case was pending and he must come to Lynchburg on the next train, he wired in response, "Sick with typhoid fever, and can't come"; that this statement as to his health was false.

Mr. LITTLETON. Was that contempt in the presence of the court?

Mr. EMERY. No. He was absent from the city where court was to be held for trial of his case and on that day he sent this telegram in order to secure a continuance from the court, stating that he was ill, when, as a matter of fact, he was not ill.

Mr. LITTLETON. How did the court treat it in that case—as a direct or an indirect contempt?

Mr. EMERY. The court disposed of that in this manner:

Being of opinion that the defendant was guilty of contempt, we shall not attempt any classification of it as a direct or indirect contempt. If it were a direct contempt, then its punishment was without doubt to be ascertained and fixed by the court without the intervention of a jury by the terms of the law.

The law provided that in direct contempts the judge would make his own findings, but in the matter of indirect contempts, as in this bill, there should be a trial by jury, if demanded by the respondent. The court thus states the issue:

It is incumbent upon us to consider whether it was within the power of the legislature to deprive the court of jurisdiction to punish it without the intervention of a jury.

To this the court answers:

In the courts created by the Constitution there is an inherent power of self-defense and self-preservation; that this power can be regulated, but can not be destroyed,

or so far diminished as to be rendered ineffectual by legislative enactment; that it is a power necessarily resident in and to be exercised by the court itself, and that the vice of an act which seeks to deprive the court of this inherent power is not cured by providing for its exercise by a jury.

This is the voice of the supreme court of Virginia.

Mr. DAVIS. Does not the court predicate its opinion on the fact that it was a constitutional court?

Mr. EMERY. Yes, sir; exactly.

Mr. FLOYD. What is the constitutional provision in that State?

Mr. EMERY. The constitutional provision is that the judicial power of the State shall be vested in such courts, naming them.

Mr. DAVIS. Singularly enough, in West Virginia we have the supreme court described in the constitution, and also the circuit courts, and yet the supreme court has twice, since the case of State *v.* Frew & Hart, held the act constitutional as to all courts except the supreme court.

Mr. EMERY. That is, as to all courts named in the constitution?

Mr. DAVIS. All courts except the supreme court of appeals, although the circuit courts are named in the constitution.

Mr. EMERY. You mean as a limitation on their power?

Mr. DAVIS. Yes.

Mr. EMERY. What cases are those?

Mr. DAVIS. The cases of State *v.* McClaugherty (33 W. Va.) and State *v.* Hansford (43 W. Va., 773).

Mr. EMERY. I should be very glad to look at any cases of that kind.

Mr. DAVIS. In the case of State *v.* Frew & Hart, where the case arose in the Supreme Court, the gist of the decision is that the act ex vi termini did not apply to the Supreme Court, because the Supreme Court had no machinery for summoning a jury, and therefore it could not be inferred that the act was intended to apply to it. But in that case, that being the point of the decision, they go on to say that the supreme court of appeals having jurisdiction expressly defined by the Congress can not be impinged upon by the legislature, and that if the act had sought to do so, it would have been unconstitutional for that reason. But they evade that question entirely in State *v.* Frew & Hart, and simply hold the act by its terms did not apply to the Supreme Court. In these two later decisions they hold that the act does expressly apply to the circuit courts, and is as to them constitutional.

Mr. EMERY. The gentlemen will remember that in that case of State *v.* Frew & Hart, while the court did not avoid that question, it said it was not necessary, in view of the fact that it could not be interpreted as applying to that court. But they did not hesitate to say if it did they would declare it invalid.

Mr. DAVIS. That is purely obiter; an expression of opinion, and nothing more.

Mr. EMERY. They pointed out the long line of decisions in which it has been held in other States that, under precisely similar conditions, a legislative act where it did apply to a constitutional court was held invalid. They say in Frew & Hart:

In this country where the courts are in the divisions of power by the constitutions of the several States constituted a separate and distinct department of government clothed with jurisdiction and not expressly limited by the constitution in their power to punish for contempt, the inherent power that is thus necessarily granted them can not be taken away by the legislative department of the government.

Mr. DAVIS. You will notice that in State *v.* Frew & Hart they concede, in the course of their opinion, the constitutionality of the act as to the circuit courts, although, of course, that question was not there presented for decision.

Mr. EMERY. I do not recall the exact language which they use, but I know that they do hold this point, which is held in all the other States, that if the court, whatever its name may be, is a court created by the constitution, deriving its judicial power therefrom and not from the legislature, it is beyond the power of the legislature to take away that inherent element in the judicial power, to wit, the right to investigate and punish its own contempts.

Mr. DAVIS. But they indicate they would so decide if that were the question upon which the decision turned.

Mr. EMERY. They say expressly, "We have this power, but it is not necessary to say in this case that the legislature has attempted to take it away from us; therefore we do not decide that the act is invalid."

But my proposition does not rest on that case alone. The question has been repeatedly decided in the other jurisdictions. Thus, in Nichols *v.* Judge of Superior Court (130 Mich., 192), decided in 1902, the question is likewise met. The judicial power of the State of Michigan is constitutionally vested in almost the identical language in which it is vested in the courts of the United States. According to the Michigan constitution, it resides "in one supreme court, in circuit courts, in probate courts," etc. The supreme court states the issue thus:

> The question, therefore, is again presented to this court, Have the circuit courts of this State the inherent power to punish for contempts, or are they subject to the control of the legislature? The question is an important one in the administration of the law. If the legislature can determine what acts shall constitute contempts in the circuit courts, it can abolish the power of such courts to punish for the contempts. There is no middle ground; either the courts have the absolute control, under the constitution, over contempt proceedings, or they have only such as the legislature may see fit to confer.

And they held flatly and squarely that the legislature can not exert such control.

Before I forget it, let me say that the decision in the Carter case (96 Va.) was re-presented to the supreme court of Virginia in the case of Burdette *v.* Commonwealth (103 Va., 839), and reaffirmed and emphasized.

The case from Michigan to which I have just referred arose on application for a writ of habeas corpus because of commitment in a contempt proceeding by the superior court of Grand Rapids, a part of the circuit-court system. The question was one of jurisdiction, as to the power of the court to proceed for contempt in this case.

Mr. LITTLETON. Was that a case in which the legislature had provided for a trial by jury?

Mr. EMERY. No; it was a case in which they had limited their power to punish for contempts.

Mr. LITTLETON. You mean the amount of punishment?

Mr. EMERY. By a definition. They thought they had excluded the character of the contempt committed.

Mr. DAVIS. That case, of course, would not be authority in the Federal courts, for we have already section 725.

Mr. EMERY. I am considering now whether or not the Federal courts possess inherent power. and in reply to the suggestion that we have section 725, I ask every member of the committee to consider this proposition. If Congress repealed section 725 of the act of 1831, defining the instances in which the courts of the United States, Supreme, circuit, and district, may punish for contempt, would the power to punish for contempt cease to exist in the courts of the United States?

Mr. DAVIS. Not at all; it would be enlarged.

Mr. EMERY. Then it would still exist. But it would not be by virtue of any act of Congress; it would be by virtue of the inherent judicial power itself, or not at all. If that be the answer, then that conclusively answers the first proposition I lay down, that the power to punish for contempt is an inherent judicial power in the courts of the United States, and that as an incident of that power the right to investigate whether or not a contempt has been committed, and to judge the question of law as to whether or not it is a contempt inheres by its nature in the court. It can not be taken from it.

Mr. DAVIS. Is that a logical sequence? Does that conclusion necessarily follow? I think we will all concede that the inherent power to punish for contempt rests with the court; but that does not go to the question whether or not the legislative branch, as to those courts within its control, may restrict or regulate the exercise of that power.

Mr. EMERY. I am not objecting to the regulation of power; I am objecting to its destruction. It is a contradiction in terms, obviously, to say it has the inherent power to punish for contempt, but that some other department of the Government can take it away. If it can take it away it is not inherent. Another answer is that the legislature can not take the power away, because it did not give it.

Mr. DAVIS. It is not a question of taking away, but of regulating the exercise.

Mr. EMERY. If you lodge the power to pnnish for contempt, or ascertain whether or not a contempt is committed, in a jury, then, obviously, it is taken from the judge; and if it is to be taken from the judge it must be in the power of Congress to do it. But if the power to ascertain whether or not the contempt was committed, and whether it is a contempt, is an inherent judicial power, then it can not be taken from a constitutional court, because it inheres in that branch of the Government.

Mr. DAVIS. Let me ask you a question; if I am interrupting do not hesitate to say so.

Mr. EMERY. Not at all.

Mr. DAVIS. You say the legislative branch can not take that power away from the court because it inheres in it, and I think it would follow with equal force that it would be true the courts themselves can not surrender that power.

Mr. EMERY. That is true.

Mr. DAVIS. And yet there is plenty of precedent that the court, upon a contempt proceeding, may, upon his own motion, direct an issue of fact to a jury, or he may, as has been done in a number of cases, refer it to a master to determine an issue of fact.

Mr. EMERY. Yes, sir.

Mr. DAVIS. So that the analogy is precise. He is surrendering, divesting himself, according to your theory, of the power to examine

and investigate, and doing that by his voluntary motion. If he may do it voluntarily, may not the legislature command him to do it?

Mr. EMERY. Is he surrendering the power? He is himself the final judge of all the facts, and he is himself the final judge of the law. But, as has been the well understood practice in chancery a chancellor calls in a party to assist him in determining the facts. But notice the difference between leaving that to the discretion of the chancellor and taking it from him. That is precisely the distinction that was observed by Senator Hill in his bill. In that bill—and I call the attention of the committee to it now because this seems the appropriate time to do so—it was not proposed, as this bill does, to give the person accused of contempt a trial by jury as a matter of right.

The language of the Hill bill is as follows:

> If the accused answer, the trial shall proceed upon testimony produced as in criminal cases, and the accused shall be entitled to be confronted with the witnesses against him. But such trial shall be by the court, or, in its discretion upon the application of the accused, a trial by jury may be had as in a criminal proceeding.

Under the Hill bill it is therefore in the discretion of the court to grant or refuse such a trial upon application.

Mr. GRAHAM. But that discretion was exhausted when he had decided to bring the matter before a jury. He was bound by the verdict of the jury. The only thing he had discretion in was whether he would determine it or refer it to a jury, and when he had referred it to a jury his discretion was ended.

Mr. EMERY. That is, under the bill.

Mr. GRAHAM. Yes.

Mr. EMERY. But it was entirely within his own power to deny any jury.

Mr. GRAHAM. Your contention is that in spite of that bill, if it had become a law, even had he referred the question to a jury, the verdict of the jury would be merely advisory, and he could set it aside, if he chose; that is your position?

Mr. LITTLETON. Is there not some contention in the argument as to the difference between a judge and a jury? The Constitution says the "court."

Mr. EMERY. Yes, sir.

Mr. LITTLETON. It is not possible that a court is not always limited to a judge.

Mr. EMERY. Not at all.

Mr. LITTLETON. The court is a judge and a jury, a judge without a jury, a judge of one man, or as many judges as may be designated. Would it be, in your view, a departure from the conditions which you have cited, and from the decisions, to make a jury part of a court for the purpose of determining the questions of contempt under the direction of a judge? In other words, may not a contempt be committed by tampering with a jury, if the jury is a constitutional part of the court? And, therefore, do you not think these cases limit the application of the doctrine too much with a view to a fact that the court is a judge, instead of a court being a court either of a judge or several judges, or of a judge and jury?

Mr. EMERY. Of course, when I have used the term "judge," I am using it as a presiding officer of the court, acting in his judicial capacity. There have been many cases in which the defense has been set up that the contempt alleged was not committed against

the judge in his judicial capacity, but against him as an individual when he was not in court; and it has been uniformly held, in those cases, of course, that there was no contempt, and that the remedy of the individual, if any, was the same as any other citizen under like circumstances. Thus, in some cases, where it has been charged that a libel amounted to contempt, it was held that it was not a contempt of court, as in Illinois, in a famous case, but an attack upon the private character of the particular judge as an individual.

Mr. LITTLETON. If the law were to provide that a judge should summon a jury to try the question of indirect contempt, we will say, would that jury and that judge not constitute a court, under the meaning of the Constitution?

Mr. EMERY. Whether that were so or not, Mr. Littleton, the fact would remain that under all the precedents cited, and the practice from time immemorial, and under the definition of what is the judicial power in a matter of contempt, whether we take it from the common law or from the uniform practice of English chancery, and whether we take it from our State or Federal courts, we can only answer in one way, and that is that it has been held again and again, time out of mind, that the right to investigate whether or not an alleged contempt was committed as a matter of fact, and whether the thing done was a contempt, as a matter of law is solely for the court against which the contempt is committed, and that every effort to either put that in the hands of another tribunal, whether it be another court or a jury, has been condemned as beyond the power of the court, or the legislature that undertook to do it. In the case of ex parte Bradley in Sixth Wallace, an attorney in the Supreme Court of the District of Columbia was accused of contempt because of certain conduct in the very presence of the court, and that court sat both as a supreme court and as a criminal court. The alleged contempt was committed during the trial of a criminal cause, the court undertook to compel him to answer for it while sitting as a supreme court, a thing distinct and different from the criminal court in which the contempt was alleged to have been committed. Under these circumstances the Supreme Court laid down the rule that, as the alleged contempt was committed in the criminal court, another tribunal, it was not in the province of the Supreme Court of the District of Columbia, or of the same judge or other judges sitting as a supreme court, but constituting a separate and distinct tribunal from the one in which the contempt was committed, to inquire into a contempt committed against another court.

Mr. LITTLETON. That was in the presence of the court?

Mr. EMERY. Yes, sir.

Mr. LITTLETON. Would it not be different? For instance, take New York State, where a man failed to obey an order of the court directing him to submit to examination in supplemental proceedings. He was brought up for failure to obey that order. Is it not frequently and constantly the practice that the man's contempt may be returned before any judge sitting in special term?

Mr. EMERY. That is where a commissioner or some agent or officer of the court has been the victim of the contempt.

Mr. LITTLETON. No. You know the policy of supplemental proceedings. A judgment creditor may sue a judgment debtor, and after awhile he may get an order to examine him as to how much property he has. If the debtor fails to obey that order of the court—

say Judge A issues an order—he may be punished for contempt, on return showing his disobedience, before Judge B, who may be, in the revolution of the court, sitting there at that time.

Mr. EMERY. The very proposition you set up yourself awhile ago answers that. That is the distinction between the person of the judge and the court itself.

Mr. LITTLETON. Is it not rather a distinction between a contempt committed in the presence of the court, which may not change its character to punish that contempt, and the contempt committed against the process of the court generally, which may be punished by any other judge upon a showing upon return that it is a contempt of the process of the court.

Mr. EMERY. So far as the right of the court to be the exclusive judge of an attack upon itself, amounting to an obstruction of justice or disobedience of an order, the whole line of decisions makes no distinction whatever between so-called direct and indirect contempts in sustaining the right of the court against which the contempt is committed to act without the intervention of another tribunal.

Mr. MCCOY. Did you the other day make any reference to the distinction, which Mr. Wilson of Pennsylvania suggested to you, between inherent powers and implied powers? Do you think there is any valid distinction of that kind with reference to this question?

Mr. EMERY. I think a power may be implied without necessarily being inherent. I think an inherent power is one which arose from the nature of the thing created, so that, if we undertook to examine the essence of the thing created, we would find certain things fixed in its being, while an implied power may arise from some duty laid upon a person or tribunal and necessary to the performance of a fixed obligation. Thus, for instance, take the power of Congress to punish for contempt.

In the Kilbourn case, you will remember, it was pointed out that the Constitution provided directly only for the punishment of its own members by Congress; but from the fact that Congress was given the power to inquire into the validity of the election of any one of its members, having the power to summon witnesses for the purpose of making that inquiry, it was also to be implied that it had the power to punish a person who refused to appear as a witness. Thus was a power implied absolutely out of the duty fixed by law upon Congress. But I say inherent in the case of the judiciary, because we have before us a conception of the judicial power totally different from that which existed in England; that is, it is a separate and independent branch of the Government and was meant to be and remain such. As Chief Justice Marshall says, its powers were to run side by side with other branches of the Government. Here we have the judicial power itself created by the Constitution, and when Congress creates the receptacle for it, it is the Constitution alone that vests the power. We say there is an inherent power in the very language of investment and the judicial function that arises from it.

Mr. MCCOY. The exercise of the inherent power which you claim also is dependent upon a duty to perform it, is it not a duty imposed on the court, so that itself would not be a valid distinction between the two. You say that Congress has implied powers because it has the duty to do something.

Mr. EMERY. Yes, sir.

Mr. McCoy. It is the same way in regard to the inherent powers, it is the duty of the court to protect itself, and therefore you claim it has the inherent power; that is, it is not a matter personal to the court?

Mr. Emery. It is in the power of Congress to do many things. It has the general power to do a number of things, and it has the discreation to select which of those things it will do. A court has no choice but to hear a proper case that is presented to it, nor can it refuse to decide it or to enforce its judgment.

Mr. McCoy. It can refuse to inaugurate the proceeding.

Mr. Emery. It never does inaugurate a proceeding. It is a passive body, and it is excited into action by the presentation to it of a justicable matter.

Mr. McCoy. I mean a contempt.

Mr. Emery. It is in the nature of the judicial power to be compelled to exercise itself upon any matter properly presented to it. It has to hear it; it has to decide it; it has to enforce it. Those three things are what distinguish the judicial power from every other power.

Mr. Graham. As I understood Mr. Wilson's argument, his position was that all governmental power inhered in the people as a body.

Mr. Emery. Yes, sir.

Mr. Graham. And that when their inherent power was subdivided into legislative, executive, and judicial, the powers of each one of those functions of government were only implied, and that none of them had any inherent power. I am not sure I understood him rightly.

Mr. Emery. Mr. Wilson would concede that the Constitution grants the power given to certain agencies. They granted certain power to a judicial, an executive, and a legislative agency, and the other morning I called your attention to a decision of Justice Brewer, in Two hundred and sixth United States, as to the extent of the judicial power that was granted, the fullness of the grant. Of course the people can not at once give and keep, and that is why it is especially provided that all those powers not especially granted are retained by them.

Mr. Wilson. You would not consider a power as being inherent that had been specifically granted?

Mr. Emery. I do not mean by "inherent," inherited. A thing inherited is passed from one to another; to inhere is to be embedded in the nature of a thing.

Mr. Webb. Have you discussed the power of Congress to limit the extent of the punishment?

Mr. Emery. No.

Mr. Webb. What is your idea about the power of Congress to limit the extent of the punishment in contempt cases? Can we do it?

Mr. Emery. I think within reasonable limits you can.

Mr. Webb. Who decides what is reasonable and what is unreasonable?

Mr. Emery. In the last analysis it must be a court, nobody else. No other body has that power. That is precisely what the State courts have repeatedly said. It does not lodge in the courts because of any reason personal to the judges. The judicial power, and its judicial agencies, the judges, as they themselves say again and again,

are merely exercising the powers conferred upon them by the people, to be their agents, and when they punish for contempt, they perform a duty which rests upon them by virtue of the organic law creating them; they are merely the trustees of the power of punishing, in their person or in their court, the thing which is done to degrade the people's representative or prevent the accomplishment of the purposes for which the courts exist.

Mr. WEBB. If these courts have the inherent right to punish for contempt at their discretion, according to your argument, are we not violating this inherent right when we attempt to limit it in any degree?

Mr. EMERY. Not at all; no more than you are violating their inherent right to hear a cause when you decide which causes they shall hear and which they shall not.

Mr. WEBB. Suppose we fix the punishment at $100 for a contempt and the court does not think that is sufficient; have they the power to set that aside and punish the offender by the imposition of a fine of $5,000?

Mr. EMERY. The question of the policy of Congress in doing so would not be open for discussion; but I say with respect to any inherent power of that character the question the court might be called upon to decide, according to the nature of the case, would be whether or not it prevented the judicial power from performing its function.

Mr. WEBB. It seems to me, according to your argument, if the court has the inherent power to punish for contempt it also has the inherent power to punish at its own discretion, and we can not take any of that away.

Mr. EMERY. The question is not directly raised here as to how far you can limit that power.

Mr. WEBB. No, it is not.

Mr. EMERY. I think there must necessarily be a limit to it.

But in determining it in any instance the gentlemen must meet this situation: If you can fix *any* limit on its power to punish for contempt, or you alone may say what shall be a contempt, then the legislature possesses the complete power to destroy the judiciary, because it can take entirely from it the right of self-defense; it can take absolutely from it the right to enforce its decrees and leave it stripped of everything that makes it the depositary and administrator of judicial power, leaving it, as one court says, "so contemptible in itself that it would be contemptible to everyone else."

Mr. WEBB. I came to the conclusion from your argument that the court has the power to punish to the full extent of its discretion, only limited by the words in the Constitution that prevent cruel and unusual punishments, and at the last the court itself is the judge of what that punishment shall be.

Mr. EMERY. Surely the gentleman will distinguish between regulating a power and inpairing or destroying it.

Mr. WEBB. We can not regulate an inherent power.

Mr. EMERY. That is precisely what the Supreme Court of Missouri says in State *v.* Shepherd (177 Mo.); you can not regulate an inherent power.

Mr. WEBB. Then if we can not, we can not regulate the punishment.

Mr. EMERY. I say it is not necessary to go as far as that in this discussion to meet the circumstances of this bill. It asserts more than is required.

The CHAIRMAN. Under the power to regulate a court can Congress abridge the power of the courts in contempt cases?

Mr. EMERY. I think that is necessarily true, if it has the power to regulate.

The CHAIRMAN. Then if it can, under the regulating power, abridge the power of courts to punish in contempt cases, why can it not pursue the process of abridgment so that it deprives the court virtually of any power to punish contempt at all?

Mr. EMERY. I think, Mr. Chairman, that is answered by a long line of decisions. You alone are the judge of what remedies may be applied to a suitor, but that does not mean you can take from a suitor every remedy he has, or you can take any essential remedy necessary to protect constitutional rights, unless you give others that are equivalent. It has been decided again and again that because you possessed the power to fix the remedies you could not take them away from an individual entirely. That seems to illustrate the difference between regulating the use of a power and impairing or destroying it, especially, as in this case, where it affects a coordinate and independent power, deriving its authority from the same source as Congress.

Mr. HENRY. Would you say Congress has any inherent power?

Mr. EMERY. I should say, as the Supreme Court did in the Kilbourn case, that it had an inherent power to punish for contempt, but not a general power to punish for contempt.

Mr. HENRY. Can you think of any other inherent powers of Congress?

Mr. EMERY. The power to preserve order, to compel the attendance of its own Members. I do not know whether to pursue the suggestion made by Mr. McCoy to call that an inherent or an implied power.

Mr. HENRY. Would you say the Chief Executive has any inherent powers? What I want to get at is this: Whether you think only the courts have inherent powers and that Congress has no inherent powers, and the Chief Executive has no inherent powers; and if you do think so, why?

Mr. EMERY. If you will pardon me, I do not think the simile is applicable, for this reason: That the Constitution has enumerated the powers of Congress in many paragraphs. Congress shall have power to do this, that, and the other thing, and it has been frequently held that is the limit of its power.

Mr. HENRY. And so I think it is with the Federal courts. I put the three coordinate branches on the same basis.

Mr. EMERY. The Constitution did not.

Mr. HENRY. I think it did. We just differ in opinion as to that.

Mr. EMERY. There is, perhaps, I think you will admit, a difference there. The Constitution has defined, for instance, what powers the President shall exercise and named them. It has defined what powers Congress shall exercise and named them. But of the judiciary department it has simply said it shall have judicial power in law and equity and left that to be defined by reference to an established power well known to the framers of our Constitution.

Mr. HENRY. In order that you may understand me thoroughly, I think that the Constitution gave judicial power to the courts just as it gave executive power to the President and just as it gave legislative power to Congress—and I am using the terms used in the Constitution—that it meant for Congress to control whatever judicial

power of the creatures of Congress it saw proper to control if it brought those courts into existence, and it used the words "judicial power" only for that purpose in order that there might not be judicial power left in Congress, and there might not be judicial power conferred on the Chief Executive. That is the only reason those phrases were selected by the framers of the Constitution.

Mr. EMERY. Mr. Justice Brewer has answered your question, Mr. Henry, completely in the case of Kansas *v.* Colorado (206 U. S.), where he points out the extent of the power conferred, the restrictions upon the legislative, and the lack of restriction upon the judicial power.

Mr. HENRY. Yes; I have read that case.

Mr. MCCOY. If it will not get you too far away from your line of argument, you have been speaking of courts which somebody said would be too contemptible for contempt, or something of that kind. What sort of a court, if it is a court, is provided for, or has Congress power to establish, under the gift of powers to Congress as follows:

To constitute tribunals inferior to the Supreme Court?

That is one of the express powers.

Mr. EMERY. I think the first case in which that section was construed was the case of Canter *v.* Insurance Company (1 Dallas), by Mr. Justice Marshall, where he made the distinction, as I pointed out the other day, between constitutional courts, or those which derived their authority from the Constitution, and legislative courts, or those which derived their authority from Congress under that express section. All the territorial courts may be said to represent the exercise of that power.

Mr. MCCOY. You would think that meant that the express power was to create some tribunal different from that referred to in section 1 of article 3, giving the power to establish inferior courts?

Mr. EMERY. Manifestly. If the Constitution vested this power in the courts in one place, it could not be vested in somebody else in another place without a self-evident contradiction; that section has been construed in many cases and distinguished from section 1 of article 3.

Mr. GRAHAM. Just one more point. The Constitution, as I recall the language of it, provides that the judicial department shall consist of a supreme court and such other courts as may be established. Would you concede that Congress has power to determine what shall constitute a court? For instance, there must be a clerk, and there must be a marshal or sheriff before there is a court. Could Congress go further and say, for this particular purpose, that there must be a jury to constitute a court? Do you think Congress has that power?

Mr. EMERY. If you mean that Congress could say that a court of equity——

Mr. GRAHAM. Any court.

Mr. EMERY. Any court, then—that is, that Congress would undertake to prescribe the instrumentalities of the court is an obvious result of its right to fix the jurisdiction and the other conditions to which you refer. But that it shall change the nature of the judicial power under any form of legislation is obviously beyond its power. Otherwise it can not be a coordinate but a superior branch of the Government.

Mr. GRAHAM. That would not be a change of its judicial power at all.

Mr. EMERY. It would be a change, presuming it to be one of the only two kinds of courts with which we are familiar and the only two kinds that were known to the framers of the Constitution—that is, courts of common law and courts of equity. It has been repeatedly said by all the interpreters of the Constitution that the judicial power was not defined in the Constitution but was spoken of as something well understood and established.

To say that Congress could create a court of either kind and strip it of the essential things that made it that kind of a court, must be self-destructive; that is, if it made an equity court on the one hand, and compelled it to bind its conscience by the findings of a jury on matters of fact; or created a law court, on the other hand, and made the court itself, without a jury, the judge of questions of fact as well as of law—because in reply to your question, if it can make a court on the one hand accept a jury where, by the nature of things, at common law or in equity, it did not have one, then, on the other hand, it can compel the jury to be taken away under precisely similar conditions.

Mr. GRAHAM. You do not rightly interpret my language. Where you say make a court accept a jury I say make a jury a part of the court—a necessary, constituent element of the court.

Mr. EMERY. What kind of a court?

Mr. GRAHAM. A court. Just now, as I illustrated, the clerk is a necessary part of any court; so is a marshal or sheriff. There could be no court without those officers. Could Congress go on and say, neither shall there be a court for such purposes without a jury?

Mr. EMERY. My reply has to be the same.

Mr. GRAHAM. That is, it could not be so?

Mr. EMERY. If it is an equity court, and to exercise an equity jurisdiction, it can not make a jury a part of that court, to do the things which an equitable jurisdiction forbade.

Mr. GRAHAM. I did not want to argue it with you; I just wanted your view.

Mr. EMERY. I could not, in view of what I said, think otherwise.

The CHAIRMAN. Mr. Emery, I assume that you will file a brief of argument with the committee after you have concluded your oral statement?

Mr. EMERY. Yes, sir.

The CHAIRMAN. I want you, when you come to consider that, to answer this question, whether or not it is competent for the legislature—that is, Congress, in this case—to designate cases in which a court may punish summarily.

Mr. MCCOY. Mr. Emery, just one question more. Take a look at article 3, sections 1 and 2, and say whether you believe the words "the judicial power" were intended to connote exactly the same thing in each of those sections; or whether, in section 2, they were meant to refer to jurisdiction other than what you call powers.

Mr. EMERY. No, I do not. I think it means the same thing in both. It only enumerates the things to which the power may be applied. There are other things. For instance, Congress could not give the Supreme Court any original jurisdiction other than what it

has. It could not create a new thing upon which it could exercise its original power.

Mr. McCoy. Is not section 2 an attempt to confer jurisdiction in certain cases?

Mr. Emery. No. I understand, in a Federal case, Federal jurisdiction always depends upon one of two things, either upon the character of the controversy, or upon the character of the persons involved in the controversy, and those two things alone answer the question as to whether or not it is a Federal controversy. I am speaking of Federal courts, of course, and confining the discussion, necessarily, to things of which a Federal court may take cognizance. It can not, of course, take cognizance of a vast number of things left with the States.

Mr. McCoy. Section 2 is the section that provides their jurisdiction, is it not?

Mr. Emery. Not necessarily their jurisdiction. It is the character of controversies to which it can be applied. Congress could give that jurisdiction in those cases, if you please—original jurisdiction—under the general power to give it; but if it did so, the court itself could not act, for the reason that its power has been limited to certain controversies. Congress can not extend its jurisdiction there.

Mr. McCoy. No; but the Constitution there says in what cases the Supreme Court can act. It gives it original jurisdiction in some cases and appellate jurisdiction in others. My point is this, that possibly the words "judicial power," as used there, might be equivalent to "jurisdiction of the Supreme Court shall extend to so-and-so."

Mr. Emery. I think that has been generally construed to refer to the judicial power of the Nation as distinguished from the judicial power of the States, and in respect of controversies to which the national judicial power can be applied.

Mr. McCoy. Then it would be a question of jurisdiction, would it not?

Mr. Emery. No, I think it is more than that.

It is obviously impossible for me, Mr. Chairman, to cover all the ground within the time your indulgence has kindly given me. I want, however, to call your attention to a few more State cases. Then I may cite a few more Federal cases, and will then conclude with a supplemental brief that may put my arguments more concisely than I have been able to do, subject to necessary interruptions.

I do not want to refer to a long line of old cases in which the doctrines I have here stated have been uniformly held for a number of years. I have already referred to some new cases in which the doctrine stated in the case of Frew & Hart (24 W. Va.) and in Carter's case (96 Va.) was affirmed. I called your attention to the case in the Oklahoma Reports (Smith *v.* Speed, 11 Okla.), because it illustrated the application of the same principles in Territorial government, an attempt being made by a Territorial legislature to make a Territorial court accept a jury in contempt cases.

Another fairly recent case with the same issue is State *v.* Shepherd (177 Mo., 205), in the supreme court of Missouri:

This case decides that under the constitution of Missouri a court of record has an inherent power to investigate the commission of a contempt and punish it. That the fact that a contempt is not triable by jury as a matter of right or privilege and that the legislature has no power to take away, abridge, impair, limit, or regulate the

power of courts of record to punish for contempt, and section 1616 of the Revised Statutes of Missouri, 1899, is unconstitutional in so far as it attempts to do these things.

Mr. WEBB. That decision has been pretty severely criticized by law writers, has it not?

Mr. EMERY. I think a pretty large number of decisions have been criticized.

Mr. WEBB. I mean that one particularly.

Mr. EMERY. I do not understand it was criticized on doctrine stated here, but on the question of whether or not the acts committed were a contempt. There have been many criticisms of courts for punishing newspaper editors for articles published during trials. In the Shepherd case, during the pendency of an action for damages the court was accused of being corrupt, owned by the railroads, and having agreed to decide the case a certain way. That sounds like a fairly good case of contempt.

In Hale *v.* The State (55 Ohio St. Rep., 210) is another case in point:

In this case the inherent power to punish contempts and enforce orders of court by summary proceedings is fully sustained, and it is said of sections 6906 and 6907 of the Revised Statutes, which make certain acts formerly punishable as contempts now punishable by indictment as offenses against public justice, that if it is to be interpreted to take away from a constitutional court its inherent right to punish offenses of this character when they are contempts of court, the statute will be invalidated.

In Ex parte McCown (139 North Carolina), decided in 1905, sections 648 to 657 of legislative act of 1871 were pleaded to prevent punishment for contempt. The court said:

We are satisfied that at common law the acts and conduct of the petitioner, as set out of the case, constitute a contempt of court, and if the statute does not embrace this case and in terms repeals the common law applicable to it, we would not hesitate to declare the statute in that respect unconstitutional and void for reasons which we will now state.

Of course the constitution of the State of North Carolina vested the judicial power in certain courts and gave them common law powers and powers in equity; and it was here held that the legislature could not prevent the courts by statutory definition from punishing a common-law contempt of court.

In Cheadle *v.* The State (110 Ind., 301) the court holds that it is a power inherent in courts of superior jurisdiction to determine what is a contempt and to punish it, and the legislature can not abridge this power so as to impair or destroy it.

There is another aspect of this matter to which I want also to call the attention of the committee for just a moment, and that is this:

Whenever we consider civil contempts, where a remedy has been given to a suitor, and the order made has been refused obedience, it becomes the duty of the court, as a step in an equitable proceeding, to enforce that order; and the query must then arise under the proposal of this bill whether or not, in an equitable proceeding, irrespective of any question of contempts, it is within the power of the legislature to compel a court of equity to accept a jury and bind its conscience by their finding of fact. On that there are two famous cases that seem to present an insuperable obstacle to this measure. One is the case of Callan *v.* Judd, in 23 Wisconsin, and old case, again and again referred to in the Supreme Court of the United States and in the circuit courts of the United States; and the other is the equally

authorative case of Kalamazoo *v.* Superior Court Judge, in 75 Michigan, In that case, under a statute of the State of Michigan, in an equitable proceeding a jury had been called in, under statutory compulsion, and the suitor in the case applied for a writ of mandamus to compel the chancellor to make his findings of fact without the jury required by the statute, asserting that he was entitled to the full equitable powers and procedure. That is the case that Judge Davenport referred to the other day, and I will just call your attention to a statement in it. It is a unanimous decision, and has been reaffirmed and ratified by the Supreme Court of Michigan again and again, and it has the same effect in principle as the decision in the case of Callan *v.* Judd.

Said the court there:

> It is within the power of a legislature to change the formalities of legal procedure, but it is not competent to make such changes as to impair the enforcement of rights, * * * The functions of judges in equity cases in dealing with them is as well settled a part of the judicial power and as necessary to its administration as the functions of juries in common-law cases. Our constitutions are framed to protect all rights. When they vest judicial power they do so in accordance with all of its essentials, and when they vest it in any court they vest it as efficient for the protection of rights, and not subject to be distorted or made inadequate. The right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury. Whatever may be the machinery for gathering testimony or enforcing decrees, the facts and the law must be decided together; and when a chancellor desires to have the aid of a jury to find out how facts appear to such unprofessional men, it can only be done by submitting single issues of pure fact, and they can not foreclose him in his conclusions unless they convince his judgment.

And again:

> In all ages and in all countries this distinction by nature, which was never called "equitable" except in English jurisprudence, where it was first so called from an idea that the rights were imperfect because unknown in the rude ages, when property was scanty and business almost unheard of in the regions outside of great cities, has been recognized and provided for by suitable methods substantially similar in character. * * * The system of chancery jurisprudence has been developed as carefully and as judiciously as any part of the legal system, and the judicial power includes it, and always must include it. Any change which transfers the power that belongs to a judge to a jury, or to any other person or body, is as plain a violation of the Constitution as one which should give the courts executive or legislative power vested elsewhere. The cognizance of equitable questions belongs to the judiciary as a part of the judicial power, and under our Constitution must remain vested where it always has been vested heretofore. (Kalamazoo *v.* Circuit Judge, 75 Mich., 274.)

And the constitutional language vesting the judicial power in Michigan is substantially the same as vests it in the Federal courts.

Mr. GRAHAM. That would override the provision as to cruel and unusual punishments?

Mr. EMERY. No. Every power that is granted in the Constitution is granted subject to the checks and balances.

Mr. GRAHAM. Who will fix the limitation where the cruel and unusual punishments begin—the court or some one else?

Mr. EMERY. Of course, the court has been called upon many times to pass upon that. Do you mean in any particular instance where that is offered as a defense?

Mr. GRAHAM. I mean in a case where the common sense of a man would say the court had inflicted cruel and unusual punushment. Must the court still remain the judge, or shall some other body than the court determine it?

Mr. EMERY. I think the principle you have laid down is the very principle which would fix the mind of the court.

Mr. GRAHAM. It might not. The argument that you have read from that case suggests no limitations whatever except obedience on the part of the person in contempt.

Mr. EMERY. Pardon me. The only principle settled by that case is that a man in an equitable proceeding is entitled to equitable procedure, and in the equitable procedure the chancellor is at once the judge of the facts and law, and if the legislature undertakes to take from either the individual or the court the power to proceed in an equitable manner, it has deprived the one of an essential part of the judicial power and the other of "due process of law." That is all.

Mr. GRAHAM. But, so far as that is any authority in support of your position, it simply means that by purely equitable procedure the judge shall enforce his order, and that means he shall have the power without limitation.

Mr. EMERY. It does not mean without limitation, necessarily.

Mr. GRAHAM. He enforces such punishment as he may think fit in any particular case of contempt. When you run up against the check and balance you referred to of cruel and unusual punishments, there is what nowadays we refer to as a twilight zone. Who will define the boundaries of that zone? Must the court do that, or can the legislature take a hand in it?

Mr. EMERY. The legislature can define cruel and unusual punishments; but, as a matter of fact, I will call to your attention that in most of the decisions in which that inhibition has been enforced, especially after the Civil War, the Supreme Court was called upon to protect the citizen against an act of the legislature, and not against an act of the court. I mean that in notable cases the legislatures provided such drastic forms of punishment, I suppose under the feeling aroused by the great civil conflict, that the courts were called upon to declare certain penalties cruel and unusual punishments.

Mr. GRAHAM. But you could not from that conclude that the legislature should not have anything to do with the matter?

Mr. EMERY. No, indeed. I only suggest it because in your mind it seems you think it necessary that the citizen be protected, through a regulation of contempt procedure, from cruel and unusual punishment.

Mr. GRAHAM. Just the converse. Is there not some mean course between these two extremes?

Mr. EMERY. I do not see anything in this case that in any way limits that proposition.

Mr. HENRY. Suppose the constitution of Michigan had abolished all distinction between law and equity, as many of the States have done in their courts, would that decision have been that way then?

Mr. EMERY. Of course not; because the Constitution is the grant of power, and we are arguing from a Constitution in being; not from what might be, but what it is.

Mr. HENRY. That decision, then, was based on the provision in the Michigan constitution?

Mr. EMERY. Yes, sir; on a statement in the Michigan constitution essentially similar to the one in our own Constitution.

Mr. HENRY. What was the nature of that case? It was not a contempt case?

Mr. EMERY. No; it was not a contempt case.

Mr. HENRY. What was the nature of it?

Mr. EMERY. This was a proceeding for mandamus. A man had brought an action in equity at a time when there was a statute passed by the legislature which provided that, in certain cases that were equitable in their nature, a jury must be called in to pass on the facts, and the original proceeding was governed by that statute.

Then, an appeal was had, on the ground that the legislature could not compel the chancellor to accept a jury and bind his conscience as to the facts in an equitable proceeding, and that the citizen was constitutionally entitled to an equitable procedure, in which the chancellor was the judge of both the facts and the law; mandamus was asked to compel the court to rehear the case in that way, and the Supreme Court of Michigan, on that presentation, decided that the statute undertaking to compel the chancellor to accept a jury was unconstitutional for that reason.

Mr. HENRY. I wish you would put that provision of the Michigan constitution in your remarks.

Mr. EMERY. Yes, sir; I will be glad to.

The judicial power is vested in one supreme court, in circuit courts, in probate courts, and in justices of the peace. (Art. VI, sec —.)

Mr. Chairman, I could rehearse similar decisions here at great length, and will confine them in a brief. But I want to call your attention just for a moment, not to a number, as I would like to, but to a few decisions of the Supreme Court of the United States on the question of whether the power to exclusively investigate the commission of an alleged contempt is one which lodges in a court as an inherent judicial power. There is no use going over the earlier cases.

There are a number which I will cite in a brief, Ex parte Terry (128 U. S.); Eilenbecker *v.* Plymouth County District Court (134 U. S.); the Interstate Commerce Commission *v.* Brimson (154 U. S.), in which the court says if it has ever been held anywhere that there is a right of trial by jury in a contempt case it is unknown to the court. But there is one famous case which meets this issue squarely; that of Ex parte Debs (158 U. S.). In the Debs case Mr. Lyman Trumbull raised, as an issue on the appeal from the decision punishing Debs for contempt, that he had been punished by a proceeding criminal in its nature, without the intervention of a jury, as was his constitutional right, and the Supreme Court in passing on that question was compelled to review the function of a court in a contempt proceeding. It said:

The power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been from time immemorial the special function of the court; and this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency.

And the case goes on to review a number of cases at the common law and in the various courts of the United States and State courts on the same propositiou.

Mr. LITTLETON. Does he comment at all on the question as to whether, in addition to being an impairment of its efficiency, it would

be unconstitutional or forbidden by the Constitution to transfer to another court or to a jury? Is there any comment in the case?

Mr. EMERY. No, there is not. He refers to other cases and quotes from them, in which that issue was raised. Of course, finally in the Gompers case, in 221 United States, we find the Supreme Court of the United States reaffirming all that has been here said.

> There has been a general recognition of the fact that the courts are clothed with this power—

That is, the power of punishing for contempt and making an inquiry into the fact of contempt—

> and must be authorized to exercise it without referring the issues of fact or law to another tribunal or to a jury in the same tribunal. For if there was no such authority in the first instance there would be no power to enforce its orders if they were disregarded in such independent investigation. Without authority to act promptly and independently the courts could not administer public justice or enforce the rights of private litigants.

And in the case of Bessette *v.* Conkey Co. (194, U. S.), the court is quoted as affirming that the power to punish contempt is "an inherent power."

Mr. FLOYD. Is it not a fact that in both of these decisions referred to there is simply no authority by statute directly authorizing the court to punish in those particular cases, but no authority in the statute limiting or forbidding it? Is not that the status of the law in regard to both those cases?

Mr. EMERY. Both those cases are decisions under existing statute.

Mr. FLOYD. If, under the authority to regulate, we forbid that thing, do you contend that is unconstitutional?

Mr. EMERY. I contend that the attempt to take from the court the right to inquire into the fact as to whether or not a contempt has been committed in a particular case deprives the court of an inherent right. That has been declared from time immemorial and during a long line of decisions by the Federal Supreme Court and the supreme courts of the various States.

Mr. FLOYD. In the Debs case, for instance, the attorney representing Debs raised the point—I suppose Mr. Lyman Trumbull—that he was entitled to a jury under existing law, where there is no statute providing for a jury in such case.

Mr. EMERY. No. He claimed that the proceeding in contempt was a proceeding criminal in its nature, and he was entitled to a jury.

Mr. FLOYD. That the general statute providing for a jury applied?

Mr. EMERY. That he was entitled to a jury in any criminal case.

Mr. FLOYD. But there was no direct authorization for a jury in that kind of a case under existing law at that time?

Mr. EMERY. If it was a criminal case there would be. A man is entitled by constitutional right to a jury trial in a criminal case, and his contention was that this was a criminal case—criminal in its nature, criminal in its procedure, and criminal in its punishment.

Mr. FLOYD. That is a very different proposition—it is not based on a criminal statute—to punish by an order by virtue of an inherent power of the court that has never been limited by legislative limitation.

Mr. EMERY. I wanted to distinguish, of course, between the limitation and the punishment itself. It is not necessary to pass on the question of whether you can limit the amount of punishment the

court may render. I am concerned in this inquiry as to whether or not you can take from the court the power to pass on the question of contempt and give it to a jury. That is what you are attempting to do in this bill.

Mr. WEBB. Is it not as much an inherent right of the court to punish in its discretion as it is to find whether an offense has been committed?

Mr. EMERY. The power to punish contempt in the English courts was limited a number of times—that is, as to the quantum of punishment.

Mr. WEBB. You do not hold, then, that the right to punish in the discretion of the court is inherent?

Mr. Emery. You mean the amount of punishment?

Mr. WEBB. Yes.

Mr. EMERY. I do not think that is essential at all. My personal opinion is that the amount of punishment is not essential, unless it comes down to the question where Congress should say that whenever a decree of a court was violated no person could be punished more than a $5 fine, or imprisonment for more than 24 hours in jail. I should say without hesitation that would be invalid, for two reasons, one quite apart from the question here involved, because it would be a question of the right of the suitor to due process of law.

Mr. McCOY. Do you not think the Debs case may sometime come to be an entering wedge to get the courts to consider this whole matter as a question of efficiency? They said to take away or modify that power would be to deprive them of some of their efficiency. In other words, they treated it as a practical question, apparently.

Mr. EMERY. That is only in passing. In one case here, in Fifth Missouri, a very old case, you have the converse of this case put in a startling way. A constable is cited to appear and show cause why he did not serve a process, and the court allowed the constable to make his case before a jury. The Supreme Court reversed the case on the ground that the jury could not be brought in. The courts have said again and again that it is not a matter of their personal wishes. They must exercise these powers given them as agents of the people in accordance with the manner in which the Constitution directs them to exercise them. The suitor who seeks a remedy has rights, as well as a contemnor. He comes in to have his rights enforced; the other party is avoiding a violation of law. The suitor has constitutional rights as well worth considering as the person who is refusing to obey the court's order.

Mr. LITTLETON. Is there not a broad line between the cases we are really considering and the ordinary cases where courts attempt to punish for contempt? For instance, if a court of equity should enter a decree decreeing specific performance, and somebody should fail to obey the decree, or any of the ordinary decrees or orders issued in ordinary equity proceedings, we might, for the sake of the argument, concede that nobody would wish to have a trial by jury on a return of an order of that sort.

Mr. EMERY. That is precisely what this bill demands.

Mr. LITTLETON. I am talking about it now to see if I can not strike a line of cleavage. There are ordinary contempts, such as failure to obey an order or decree for specific performance. On the other hand,

there have grown up in this country, as evidenced in this Iowa legislation which you speak of as declaring selling liquor to be a nuisance, and by reason of the issuance of an injunction substituting an injunction for the enforcement of criminal law, there have grown up in industrial disputes, in some instances, abuses for which injunctions have been issued to forbid offenses of violence, as attempts to destroy property or attempts to injure property. Is there not some middle ground where the injunction can be withdrawn as a substitute for the enforcement of criminal law and men can be given the right of trial by jury in substance and in fact, as they are entitled to, for the commission of alleged offenses, instead of summarily committing them as for the violation of an injunction process and making it a substitute for the enforcement of criminal law?

Mr. EMERY. I can not agree with the premises you lay down. The first answer is, This summary proceeding in the abatement of a nuisance like the sale of liquor is not an innovation. It was known to the English law. You will find it in the statute of King James, in 1634.

Mr. LITTLETON. Did it also make it a crime in King James's statute?

Mr. EMERY. Most everything forbidden was a crime in those days. I do not know whether that particular thing was or not. I am speaking now of the police power that was exercised and the drastic nature of punishment.

Mr. LITTLETON. The point I am getting at is this: Is it possible for us to go on declaring all sorts of offenses nuisances, and by that means, in the guise of an injunction, deprive persons who are said to be committing these nuisances of what ordinarily would be the constitutional right of trial by jury?

Mr. EMERY. I do not understand that is done in the way you suggest. Nor do I understand that in labor disputes, to be specific, there was any novelty introduced. I only understand that there are new sets of facts and new circumstances to which an old principle is applied. The only reason more attention is paid to labor disputes in these days is there are probably more persons engaged therein who violate injunctions. But there is an exceedingly small number of controversies in labor disputes in which injunctions are issued compared to the total number issued. There is not one in twenty.

Mr. WILSON. But does the comparison go with regard to the number of people affected by those injunctions? Is that in the ratio of one in twenty, or is the ratio changed?

Mr. EMERY. How do you mean, one in twenty?

Mr. WILSON. You have just stated that the injunctions issued in labor disputes are but one in twenty of the total number of injunctions issued.

Mr. EMERY. Less than that.

Mr. WILSON. What I wanted to get at was whether the number of people affected by those injunctions was in the same ratio?

Mr. EMERY. I think if you took the total number of cases in this country in which injunctions of every kind or character are issued, the number of persons affected who are not in labor organizations, not parties to labor disputes, would be far greater.

Mr. WILSON. Is it not usual in labor-dispute injunctions to make it a blanket proposition, that practically includes everybody?

Mr. EMERY. No; it is not. If the chairman wants me to, I am perfectly willing to engage in a discussion of injunctions in labor disputes. But I do not want to be led away from the issue here by a discussion of that character. If there is any specific injunction to which there is objection, that is thought to be germane to this discussion, I am perfectly willing to discuss it.

Mr. WEBB. Aside from the constitutional objection you have to this bill, do you not think, as a matter of public policy, it would be well to let an impartial tribunal determine the guilt or innocence of a party, rather than let the judge, who is really an indirect party, be the trier and sentencer of the offender?

Mr. EMERY. If the gentleman will permit me, I think that, so far as the form of this bill is concerned, if that were the object to be aimed at, I can not understand why the bill is put in the shape in which it is, because if, as Mr. Ralston said the other day, and as others have said, if the purpose of this measure is to remove from the immediate decision of the judge those contempts which may be said to be peculiarly personal to him, then this bill fails of its object, because it declares to be direct contempts, summarily punishable by him, every act that can be said to outrage the personal feeling of the judge; and declares to be indirect contempts every act with which he ought to have as much calmness as a professor of theology discussing recondite questions of Bible lore in a sacred seminary. For instance, a party spits in the face of the judge; that is a direct contempt. Is not that a case in which the judge's feelings are most thoroughly aroused?

The CHAIRMAN. And that for the reason that the judge is supposed to know what happened in the presence of the court. But when something happens wholly without the presence of the court, a thousand miles away, it is to let the accused have the right of trial by jury and have the benefit of cross-examination of the witnesses before he is put in jail; to have the passing upon the facts by an impartial jury, because the judge, from the very nature of that sort of a case, can know nothing of the facts himself.

Mr. EMERY. He is compelled, Mr. Chairman, in those cases, to proceed by inquiry and to hear the evidence. And if he denies the man either a charge in writing or a citation and an opportunity to defend himself, the Supreme Court of the United States has said again and again it will not sustain such a punishment in contempt, because on the face of it there has been an arbitrary exercise of power. That has been repeatedly held.

Mr. GRAHAM. But in how many cases—what percentage of the cases—could the victim reach the Supreme Court of the United States?

Mr. EMERY. In what percentage of the cases is there a victim?

Mr. GRAHAM. I could not answer that.

Mr. EMERY. There is a gratuitous assumption that there must be a large number of persons who are arbitrarily punished without reason. Who are they? Where are they? What do they charge against courts at this time and in this place?

Mr. GRAHAM. Speaking of one class of cases, those involving labor disputes, there are quite a few that never reach the public for the simple reason that the victim—if I may use that term—was unable, had not the means whereby to get the attention of the higher courts, or the public. I have personally known a number of such cases, where

men were taken much more than 100 miles from their homes to the court and incarcerated, for violating the terms of a blanket injunction in labor disputes.

Mr. EMERY. Yes, sir.

Mr. GRAHAM. They had not any means, and they had not any friends. Their cases never went beyond the local community.

Mr. EMERY. I have tried various times to get a list of cases of that kind. There was one filed here by Mr. Gompers some years ago, and carefully examined, and made the subject of a very remarkable analysis by Mr. Littlefield in an address in the House in 1908; and the whole number of cases at that time, covering the whole history of the issuance of injunctions in labor disputes, was, I think, only 24, and in those 24 cases the alleged abuses were not specified. There was no charge with reference to individuals. There was the general charge that judges were abusing this power. That still remains asserted but unproven.

Mr. GRAHAM. I do not pass on the question of abuse of power at all; I can not call your attention to the individual cases. I only know that persons, mostly foreigners, perhaps, unable to speak the English language at all, were arrested charged with violating an injunction, which was merely published by posting notices of it, or published in the newspapers.

Mr. GRAHAM. Without defense, of course, some of those were committed; but the public never heard about it.

Mr. EMERY. Does the gentleman know that the man was committed without an opportunity to make his defense?

Mr. GRAHAM. Not without an opportunity.

Mr. EMERY. With every facility?

Mr. GRAHAM. The most essential facility for making a defense is dollars and cents; and I take it they were without that facility.

Mr. EMERY. I do not know why we can have one rule, to say an injunction shall apply to a man who is worth so much and not to a man who is worth so little. The law can not consider, in the enforcement of its decrees, the unfortunate social position of its violator.

Mr. GRAHAM. When you come to the cases which you refer to the Supreme Court, you omit a large class of cases which, by virtue of circumstances, can never reach that court.

Mr. EMERY. Let me assume this were the law, that the party was entitled to a jury trial. If he did not have the means to go into a court and state his case to a judge, where could he get the means to go in and hire a lawyer to represent him before a jury?

Mr. GRAHAM. The custom is for the judge to appoint an attorney to represent a defendant who has not the means to employ one.

Mr. EMERY. In an accusation of felony. Who would pay the expenses here?

Mr. GRAHAM. In my State there is no such expense. The attorney, being an officer of the court, is bound to obey the order of the court, and when the court says, "You defend Smith in this case," the attorney has to do it.

Mr. EMERY. Somebody must pay the expense. The man must be arrested and brought somewhere.

Mr. GRAHAM. That expense the public meets.

Mr. EMERY. Part of it.

Mr. DAVIS. In the Federal court he may obtain his witnesses in forma pauperis.

Mr. EMERY. Will the gentleman stop and consider for a moment the practical effect of enforcing contempts by jury trial in the Debs case—paralyzing the traffic of this country? What would be the practical effect of it, quite apart from the legal questions involved?

Mr. GRAHAM. Under our form of law, I take it, the most essential thing is that each citizen is guaranteed by law his personal rights.

Mr. EMERY. Yes, sir.

Mr. GRAHAM. Would it not be better to have traffic stopped entirely than have a citizen unjustly imprisoned?

Mr. EMERY. Yes, sir; but it is equally true that all the agitation in the country and all the excitement incidental to it can not vindicate a mob destroying property, or justify stripping the courts of their protective powers because the public has rights. There are rights on both sides.

Mr. LITTLETON. I suppose you would be willing, Mr. Emery, if the law provided that in those cases where the violation of an injunction amounted to an offense against the property of a person, such as is known commonly as offenses, in those particular cases you would be willing, would you not, that the defendant should have a trial by jury?

Mr. EMERY. I will give you a case, Mr. Littleton, right here. Here is the case of United States *v.* Anonymous, 21 Federal Reporter, 761. In that case an officer of the court went out to serve a process, and the man on whom he was about to serve it knocked him down and stuffed the process and the seal down his throat. Was that a criminal act?

Mr. LITTLETON. Yes.

Mr. EMERY. Should that man have had a trial by jury in that case, or ought the court then and there to have vindicated its authority in a summary proceeding? As far as any criminal charge is concerned, he would have his trial, but separate and apart from the crime which he committed when he did that act to that individual, there was also the offense which he committed against the court's officers in this attempt to obstruct justice.

Mr. DAVIS. Obstruction of justice is an express crime by statute.

Mr. EMERY. There are very few offenses committed in the court, if you want to consider the court as an individual, that can not be punished by prosecution for assault and battery. But if every judge had to climb down and prosecute every offender for slapping him in the face we would soon lose respect for the courts.

Mr. LITTLETON. Take the case you put. The constable goes out to serve a man, and the man knocks him down and beats him and stuffs the seal of the court down his throat. Of course, that is a distinct crime.

Mr. EMERY. Yes.

Mr. LITTLETON. It may be also an affront to or a contempt of the court. But it is a crime, an assault and battery, and if it had gone far enough, and the seal had been big enough, it would have been murder.

Mr. EMERY. Yes.

Mr. LITTLETON. Then, of course, the man could have been committed for life for murder by a judge defending his inherent powers, could he?

Mr. EMERY. No, sir; that is not contended for a moment. The distinction between the criminal proceeding essential to punish any crime of any character committed in the course of a contempt and the power of the court and the duty of the court to protect its own authority immediately are just as different as daylight and darkness.

Mr. LITTLETON. Nothing should be done—in my opinion, at all events—to cripple the power of the court to see that its orders are carried out, because that means absolute disorder. On the other hand where, in carrying out the powers of the courts, there arises an act which is against the criminal law, is it not natural and proper that the person charged with the offense should seek to have that offense tried as by due process of law, by a court and a jury, instead of having that offense covered up in the guise of an injunctive process? It may be necessary that the court shall then and there vindicate its authority immediately, in order that other witnesses who may be disorderly, turbulent, resistent, or rebellious shall be immediately checked. That is an obvious thing.

The CHAIRMAN. Mr. Emery, do you think the act of March 2, 1831, was designed to meet the view just expressed by Mr. Littleton? For you know that in section 1 the power of the Federal courts of the United States to issue attachments and inflict summary punishment for contempts of court—

> Shall not be construed to extend to any cases except of misbehavior of any person or persons in the presence of said court, or so near thereto as to obstruct the administration of justice. The misbehavior of any of the officers of said courts, in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts.

Then section 2 of that act, carrying out further the idea which Mr. Littleton has expressed, provides:

> SEC. 2. *And be it further enacted*, That if any person or persons shall, corruptly or by threats or force, endeavor to influence, intimidate, or impede any juror, witness, or officer in any court of the United States in the discharge of his duty, or shall, corruptly or by threats or force, obstruct or impede, or endeavor to obstruct or impede, the due administration of justice therein, every person or persons so offending shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished by fine not exceeding five hundred dollars or by imprisonment not exceeding three months, or both, according to the nature and aggravation of the offense.

Mr. EMERY. Yes, sir.

The CHAIRMAN. Did not Congress have that idea in mind away back in 1831, to define what contempts were, and then to take certain offenses that theretofore had been held to be contempts and designate them as criminal offenses subject to indictment and provide a jury trial?

Mr. EMERY. Whatever may have been their intention with regard to defining contempts, and also providing punishments, it was never their intent to provide an exclusive punishment by indictment. They preserved to the court the right to always punish the same offenses as contempts, and I will call your honor's attention to ex parte Terry,

in one hundred and twenty-eighth United States, where, in a comment on section 725, the Supreme Court says:

> Nor can there be any dispute as to the power of a circuit court of the United States to punish contempts of its authority. In United States *v.* Hudson (11 U. S., 7 Cranch, 34) it was held that the courts of the United States, from the very nature of their institution, possessed the power to fine for contempt, imprison for contumacy, enforce the observance of order, etc.

So that, as you will observe in reading the cases, the court repeatedly refers to that statute of Congress on the one hand as limiting this power to punish for contempt, but always insists at the same time and generally in the same paragraph on the power of the court to make the investigation as to the fact of the commission of the contempt and to punish it apart from any legislation. The Supreme Court of the United States has never been called on to consider a statute of Congress that would take that power away, or so limit it as to impair or destroy the judicial power.

As to political precedents for this measure I called the attention of the committee to the fact that the Hill bill never undertook, as this bill does, to give a contemnor the right of trial by jury as a matter of right. It left it in the discretion of the chancellor, if you please, or in the discretion of the judge, to allow a jury or refuse it.

The CHAIRMAN. If the jury trial was once accorded, then all the rights incident to a jury trial were observed and accorded to him, the matter of appeal, and so on?

Mr. EMERY. That may be true, but he could not get it in the first instance as a matter of right.

The CHAIRMAN. Exactly.

Mr. EMERY. Furthermore, as to the definition of direct contempts which is placed in this bill, the majority of the Committee of the House, when reporting on the Hill bill, would not even go as far as to give a discretionary trial or to permit the jury to determine the guilt or innocence of the defendant on the contempt charge, as is provided in this bill. They proposed that the court should submit certain interrogatories to the jury and the jury was to answer those interrogatories, and then the court was to make its finding on that basis.

Mr. STERLING. You said awhile ago it was a mixed question of law and fact, did you not?

Mr. EMERY. Yes, sir.

Mr. STERLING. The Hill bill preserves that distinction, does it not?

Mr. EMERY. Yes, sir.

Mr. STERLING. It simply provides that the jury shall find whether or not certain acts were committed?

Mr. EMERY. Yes, sir.

Mr. STERLING. And refers it to the court to determine whether that constituted a contempt?

Mr. EMERY. No. That is the Ray bill. It provided that certain interrogatories should be submitted and the jury was to answer. Finally, in the minority report, signed by David A. De Armond, D. B. Culberson, W. L. Terry, and J. W. Bailey, make specific objection to one of the important sections of this bill.

The language of this bill, including as direct contempts failure to obey subpœna as a witness, or to answer a summons as a juror, is

verbally identical with the language of the Ray bill, and of this the Democratic minority of the committee said:

The committee have included in the classification of what are called "direct contempts" failure or refusal to obey a subpœna for witnesses or a summons for jurors. If such failure or refusal amounts to a "direct" contempt, it is not easy to perceive how or why a failure or refusal to obey any other lawful command of a court, whether affirmative or negative, is an indirect and not a direct contempt of court.

The CHAIRMAN. That is from the Ray report you read?

Mr. EMERY. No; that is from the views of the minority, on that report at page 9, where the minority is criticizing the inclusion of that language in the bill.

The CHAIRMAN. In that same connection I call your attention to what Judge De Armond further says:

The object of the Senate bill is to afford persons charged with indirect contempts a trial by jury, as in criminal cases. The effect of the committee substitute, if enacted into law, would be to give the accused the form of a jury trial, with the substance withdrawn. For, instead of accepting the plan of the real jury trial, as embodied in the Senate bill, the committee provide for the submission to the jury of interrogatories, prepared by the court, and to be answered by the jury in writing. Upon the answers the court will determine the guilt or innocence of the accused. About the question of guilt or innocence the jury, according to the committee, shall have nothing to say. That shall be determined by the court, which is to continue to be not only judge and jury, but accusers as well.

Believing that the citizen should be better protected in his rights in proceedings for alleged contempts of court, and believing also that additional protection for him is to be found in real and not mock jury trials, we oppose the recommendation of the committee, and favor the passage of the Senate bill. For while that bill might be improved by amendment in furtherance of its object and not against it, we are of the opinion that unless the House pass the Senate bill as it is there will be no legislation upon the subject by the present Congress.

I read that in justice to Judge De Armond and others who signed that minority view. It ought to be read into the hearing in connection with your statement.

Mr. EMERY. Yes; but what I am reading from Judge De Armond, Mr. Chairman, is very much to the credit of Judge De Armond.

The CHAIRMAN. I think this is, too.

Mr. EMERY. Judge De Armond and his associates criticized the inclusion in direct contempts to be summarily punished the failure to obey a subpœna, or to be summoned as a juror, and he said that if that could be made a direct contempt he did not see why anything could not be made a direct contempt.

The CHAIRMAN. Would you think this bill unobjectionable if that were stricken out? That could be easily stricken out.

Mr. EMERY. That is only one of many objections that I am making.

The CHAIRMAN. Would it improve it to strike it out?

Mr. EMERY. It would remove at least that objection.

The CHAIRMAN. I am asking you whether, in your opinion, you think it would improve the bill if we should amend it by striking that out?

Mr. EMERY. I think it very much improves the distinction between direct and indirect contempts. Judge De Armond says:

About this definition (the one in the Hill bill) is a degree of accuracy which must commend it to the favorable consideration of lawyers, while the committee's enlargement of this definition into that which they offer as constituting direct contempts may, perhaps, be regarded by legal lexicographers as a novelty.

I wanted to say just one word, in conclusion, on the practical side of the question. I join in what Judge Davenport said of another

feature of the bill; that is, that it includes as direct contempts, and punishes them, things that are done beyond the senses of the court, and gives arbitrary powers of summary hearing without written accusation, which seems to be condemned by the case of Ex parte Terry, In re Bradley, In re Savin, and Ex parte Robinson.

There is another thing that Mr. Littleton has referred to, and that is the most powerful objection, it seems to me, of a practical nature that can be made to this bill. It brings into being a constitutional objection of another kind, and if it were not a constitutional objection, it would certainly be one of some practical weight and force which this great committee of lawyers would surely consider. That is, you define as indirect contempts every form of disobedience of a lawful order or decree that a court can make; therefore, every suitor seeking a remedy by injunction and securing one has only secured the right to indulge in further litigation if there be persons resisting the order of the court. A man has a patent which is infringed, and secures an injunction enjoining another from manufacturing that patented article. A trust fund is being improperly appropriated or misused, as in the Cartwright case, and when that injunctive order of the court is disobeyed, the man may go on, while his contempt is being determined by a jury. The judge's power to prevent the dissipation of the fund is ended. You must have a jury trial, which takes time, subject to all the delays incident thereto, and during that time the fund which may be the subject of injunctive restraint is in the hands of this individual to use as he sees fit. The power of a court to summarily enforce an injunction given in favor of a suitor is taken from it, and when the injunction is secured, the suitor can enforce it against disobedient individuals only before a jury, inviting further litigation and endless delay by appeal. Of what practical value is a restraining order under such conditions? In the summary proceedings that now exist there is certainly sufficient opportunity for delay. The Gompers case itself is evidence of the delay that can be had on mere questions of law. It is now 3 years old, and unsettled.

There is also the individual's constitutional right to his remedy here. If a man is entitled to due process of law in this matter, he is entitled in an equity proceeding to have his rights determined in an equitable way, and to be enforced in accordance with the principles handed down from time immemorial as a court of equity enforces its decrees. He is not to go forth remediless, with a bladeless weapon, to have good citizens obey the order of the court, and those most inclined to dispute it, determined to destroy anything that may be the subject matter of it, and most tempted to do so—to have rights enforced against such individuals only after proceedings before a jury, and after all the various appeals that may be taken in a criminal proceeding. It would be, indeed, Mr. Chairman, a most remarkable departure from the immemorial proceedings with which English and American law have familiarized us. If you take from a court its right to summarily punish a contempt and enforce its decrees and leave the ascertainment of the fact as to whether or not a contempt has been committed to the determination of a jury, you leave the enforcement of all the decrees of a court in the last analysis to 12 men and not to one and destroy that power which has attached itself to our courts as of the very essence of being until, as a great judge of the United

States has said, you can no more "think of a court without the ability to itself enforce its decrees than you can think of a court without a judge." I thank you, gentlemen.

Mr. HOWLAND. Mr. Emery, in the proceedings now being instituted against the so-called trusts, would not the arm of the Government be paralyzed if this bill were the law now?

Mr. EMERY. I can not imagine how you could dissolve the Tobacco Company or the Steel Corporation if an injunction were secured against it; that is, dissolve it with the expedition with which it has been dissolved since the entrance of the decree of the Supreme Court—if each director or each party named therein were entitled to a trial by jury, with the possibility that some would be convicted and some would not, and as to others the jury might disagree; and as some were convicted they might elect new directors while the appeals of those who were found guilty of contempt proceeded.

The CHAIRMAN. We thank you very much, Mr. Emery.

(Thereupon, at 12.45 o'clock p. m., the committee adjurned.)

Appendix A.

Memorandum Submitted to the Judiciary Committee of the House of Representatives by Daniel Davenport, of Bridgeport, Conn., in Opposition to H. R. 13578, it Being a Bill to Define and Punish Contempts of Court.

This bill is an attempt to prescribe by congressional enactment the sole method which all the Federal judges and courts, except the Supreme Court, must pursue in proceeding to punish persons for contempt of their authority. It is one of several bills now pending before this committee having that object in view.

It is to be noted at the very outset that it throws the whole matter into hopeless confusion and uncertainty by including in its enumeration of the various acts which it calls "direct contempts" every contempt "committed so near the court as to obstruct the administration of justice," and by failing, at the same time, to specify what, if any, the "other contempts" are which compose the class of so-called "indirect contempts" created by the bill. Since nearly, if not quite, every contempt, wherever committed, operates to obstruct the administration of justice (otherwise it could not be a legal contempt of court) and is therefore of necessity near enough to the presence of the court to do so, it would seem that the courts would be obliged to hold that every contempt which obstructs the administration of justice is included under this head. And this construction would seem to be also forced upon the courts by the further fact that many instances of what have always been called constructive contempts, which are far lest serious in their effect upon the conduct of the business of the court than those not specified in the bill are expressly included in the class of "direct contempts." What sense would there be in the courts holding, for instance, that the bill intended that a marshal, a witness, or a juror must be summarily proceeded against for failing to obey the orders of the court, but that a lot of conspirators, who by murder, imprisonment, intimidation or bribery of the marshal, the witness, or the juror had perhaps wholly stopped the business of the court, could not be so proceeded against? On account of this uncertainty in the bill, how is any Federal court to know what course to pursue under its provision in proceeding to punish any given contempt? The Supreme Court in construing Section 725 of Revised Statutes, expressly declined to express an opinion on the question whether every contempt, wherever committed, which obstructs the administration of justice does not fall within the words, "so near thereto as to obstruct the administration of justice."

"Whether the attempt to influence the conduct of the trial-term juror McGarvin was or was not, within the meaning of the statute, so near to the court 'as to obstruct the administration of justice' however distant from the court building may have been the place where the appellant met him is a question upon which it is not necessary to express an opinion." (Cuddy, Petitioner, 131 U. S., 286, 287.)

Passing by these suggestions, however, the bill seeks to accomplish its purpose by dividing all contempts of court into which it calls "direct contempts" and "indirect contempts." In doing this, it disregards entirely the classification heretofore, time out of mind, employed by the courts into contempts in the face of the court and those committed out of its presence, upon which distinction there has always hung the most vital difference in the rights of the accused as to the mode of his trial. It also completely ignores the well-settled and vital distinction between what are known to the courts as "civil" and "criminal" contempts.

In its classification, under the head of "direct contempts," it places not only all contempts committed in the face of the court—that is, committed within the scope of the judges' senses—but also all others committed outside of such presence, if so near as to obstruct the administration of justice, and all contempts committed by an officer of the court through any misbehavior in his official transactions, one form of which misbehavior is particularly pointed out and mentioned in the bill, to wit, disobedience of the lawful process or orders of the court or judge. In this class is also placed contempts committed by witnesses and jurors in failing to obey lawful subpœnas and summons.

Whatever other contempts there may be not falling within the scope of the class called "direct contempts" are thrown together in another class of so-called "indirect contempts."

All the so-called "direct contempts" are to be proceeded against "summarily," whatever that may mean, without written accusation against the accused. Apparently the attempt here is to authorize and require the same mode of procedure in all the cases comprised within this class as is now employed in cases of contempts in the face of the court. If the accused is found guilty the judgment is to be entered of record, which must set forth the conduct constituting the contempt, the defense or excuse offered by him, and the sentence imposed. No appeal or other review is provided.

From all this appears how radical is the departure in the bill from what has prevailed hitherto in the way of the classification of contempts and the procedure to punish them.

"A contempt of court is either direct or constructive. Direct when there is an open insult in the face of the court to the person of the judge while presiding, or a resistance of its power in his presence; constructive when an act is done, not in the presence of, but at a distance from, the court, in disobedience of an order or to the process of the court tending to embarrass, interrupt, obstruct, or prevent the administration of justice." (Ex parte Wright, 55 Ind., 504; Ex parte Terry, 128 U. S., 309.)

So far as this class of so-called "direct contempts" provided for in this bill is concerned, it needs little authority to show that, with the exception of those contempts which are committed "directly under the eye and in the personal view of the court or judge," a judgment and sentence resulting from this new mode of procedure would be void as a deprivation of the liberty or property of the accused without due process of law, and that the mode of procedure directed by the bill in this respect would be unconstitutional on that account, and the provisions of the bill relating thereto would be void. No more flagrant violation of the fundamental rights of the citizen could be imagined.

"While an offender may be instantly punished for a direct contempt in the face of the court by arrest and fine or imprisonment, without other proof or examination than the knowledge of the judge, gathered from his senses, in case of a constructive contempt, a prima facie case must be made against the alleged offender either by an affidavit, by the official return of some officer, or by other legitimate evidence in a way that can be made part of the record. In such case a rule nisi should be entered against the offender before the writ should issue, unless delay be dangerous to the injured party, but in no case of constructive contempt can either the rule or the writ go until the facts are put upon the record in such manner that they may be demurred to, moved against, or controverted." (Ex parte Wright, 65 Ind., 505.)

"It is undoubtedly a general rule in all actions, whether prosecuted by private parties or by the Government—that is, in civil and criminal cases—that a sentence pronounced against a party without hearing him or giving him an opportunity to be heard is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. But there is another rule, of almost immemorial antiquity and universally acknowledged, which is vital to personal liberty and to the preservation of organized society, because upon its recognition and enforcement depend the existence and authority of the tribunals established to protect the rights of the citizens, whether of life, liberty, or property, and whether assailed by the illegal acts of the Government or by the lawlessness or violence of individuals. It has relation to the class of contempts which, being committed in the face of the court, imply a purpose to destroy or impair its authority, to obstruct the transaction of its business, or to insult or intimidate those charged with the duty of administering the law. Blackstone thus states the rule: 'If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination. But in matters that arise at a distance, and of which the court can not have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges, upon affidavit, see sufficient ground to suspect that a contempt has been committed, they either make a rule on the suspected party to show cause why an attachment should not issue against him; or, in very flagrant instances of contempt, the attachment issues in the first instance, as it also does if no sufficient reason is shown to discharge, and thereupon the court confirms and makes absolute the original rules.'" (Ex parte Terry, 128 U. S., 307.)

"Due process of law as used in the United States Constitution, amendment five, providing that no person shall be deprived of life, liberty, or property without due process of law, means that law of the land which derives its authority from the legislative power conferred on Congress by the Constitution of the United States within the limits therein prescribed and interpreted according to the principles of the common law." (In re Kemmler, 136 U. S., 436.)

"Due process of law means a course of legal proceedings which secures to every person a judicial trial before he can be deprived of life, liberty, or property." (Peerce *v.* Kitzmeller, 19 W. Va., 564, 565.)

"When life and liberty are in question, there must, in every instance, be judicial proceedings, and that requirement implies an accusation, a hearing before an impartial tribunal with proper jurisdiction, and a conviction and judgment before punishment can be inflicted." (Cooley Const. Lim., p. 224.)

Let us now turn to the class of so-called "indirect contempts" created by the bill. If it shall become a law, whatever contempts the court shall thereafter hold not to be embraced in the other class would fall within this class.

The first thing which arrests attention is that "civil" and so-called "criminal" contempts are alike within its scope, whether they be contempts of either the courts of law or courts of equity, and that in regard to both civil and so-called criminal contempts in both courts a jury trial of the alleged contempts must be had, if demanded by the accused.

There is a general reason why this provision would be unconstitutional and void both as to civil and criminal contempts of either the Federal law or equity courts, and a special reason why it would be unconstitutional and void both as to the civil and criminal contempts of the Federal courts of equity.

This last-mentioned reason grows out of the constitutional incapacity of Congress to compel the issues of fact or law in equity cases to be passed upon by a jury. The first reason grows out of the constitutional incapacity of Congress to impair the independence of the judiciary by depriving it of the power to maintain its dignity and enforce its decrees.

On the subject of the constitutional incapacity of the legislature to compel courts of equity to employ the instrumentality of the jury to decide questions of fact, I will quote a few cases. In Callahan *v.* Judd (23 Wis., 343) the court said:

"I think the act invalid, and my reasons are briefly as follows: The power to decide questions of fact in equity cases belonged to the chancellor just as much as the power to decide questions of law. It was an inherent part and one of the constituent elements of equitable jurisdiction. If, therefore, it shall appear that by the constitution the equitable jurisdiction existing in this State is vested in the courts, I think it will necessarily follow that it would not be competent for the legislature to divest him of any part of it and confer it upon juries. If they can do so as to a part, I do not see why they may not as to the whole. If they can say that in an equity case no court shall render any judgment except upon the verdict of a jury upon questions of fact, I can see no reason why they may not say that a jury shall also be allowed to decide questions of law.

"But the constitution (sec. 2, art. 7) provides that 'the judicial power of this State, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate, and justices of the peace. The legislature may also vest such jurisdiction as shall be deemed necessary in municipal courts.' * * *

"In order to determine the meaning of the phrase 'judicial power as to matters of law and equity,' it is only necessary to refer to the system of jurisprudence established in this country and derived from England, in which the court had certain well-defined powers in those two classes of cases. In actions of law they had the power of determining questions of law, and were required to submit questions of fact to a jury. When the constitution, therefore, vested in certain courts judicial power in matters at law, this would be construed as vesting such power as the court, under the English and American systems of jurisprudence, had always exercised in that class of actions. It would not import that they were to decide questions of fact, because such was not the judicial power in such actions. And the constitution does not attempt to define judicial power in these matters, but speaks of it as a thing existing and understood. But, to remove all doubt in actions at law, the right of a trial by jury is expressly preserved by another provision.

"But, as already stated, the power of a court of chancery to determine questions of fact as well as of law was equally well established and understood. And when the constitution vested in certain courts judicial power as to matters in equity, it clothed them with this power as one of the established elements of judicial power in equity, so that the legislature can not withdraw it and confer it upon juries. * * *

"The plain object of this provision was to enable the legislature to distribute the jurisdiction in both matters at law and in equity as between the circuit courts and the other courts in the State, giving the circuit courts such original jurisdiction and such appellate jurisdiction as it might see fit. But the jurisdiction there intended was jurisdiction of the suit.

"It may well be that the legislature may deprive the circuit courts of original jurisdiction in actions for the foreclosure of mortgages. It is unnecessary to determine whether it could or not. But it is quite certain that this clause contains no authority for it, while leaving those courts jurisdiction of this class of action, to attempt to

withdraw from them an acknowledged part of the judicial power and vest it in the jury."

And in the case of Brown *v.* Kalamazoo Circuit Judge (75 Mich., p. 277) the court said:

"As Michigan had a long territorial experience, its judicial system naturally became fashioned in close analogy to that of the United States, and so recognized and perpetuated in their essentials the classification of legal and equitable rights as involving the necessity of separate administrations in important particulars. The Constitution of the United States recognizes the division of ordinary civil jurisprudence into cases at law and cases in equity, and it has been held by the Supreme Court of the United States that this recognition puts it beyond the power of Congress to make any serious change in that classification. In Carpentier *v.* Montgomery, 13 Wall. 480, the importance of the distinction and the impracticability of disregarding it was somewhat explained in such a case as is now under consideration, as in several previous cases it had been held that the policy enjoined by Congress, of securing as far as possible uniformity of practice between the State and the United States courts, could not be carried so far as to confound the legal and equitable jurisdictions. * * *

"This leads to the inquiry whether it is competent for legislation to bring about any such radical change as is here attempted. We think it is not. The decisions of the United States Supreme Court before referred to do not bind State practice, but they nevertheless to some extent indicate the real difficulty. That tribunal did not decide that under the United States Constitution there could be no change in equitable procedure, because the whole body of chancery practice has been repeatedly amended and simplified by that court. Their rulings mean neither more nor less than that there are various kinds of interests and controversies which can not be left without equitable disposal without either destroying them or impairing their values.

"It is within the power of a legislature to change the formalities of legal procedure, but it is not competent to make such changes as to impair the enforcement of rights. In rude times, when there is no business, and no variety of property rights, very simple remedies are sufficient. But where the ordinary remedies have become inadequate to deal with more extended or peculiar interests, such as multiply in all civilized countries, different methods and different tribunals become necessary. The universally recognized basis of equitable jurisprudence, found in statutes and constitutions, as well as in the reports and text writers, is the inadequacy of the common law to deal with these subjects. A principal basis of that inadequacy was the nature of the tribunal passing on the facts. In common-law cases issues of fact and law can be readily separated; but in the great majority of equity proceedings it is impossible to make any such separation.

"The function of judges in equity cases in dealing with them is as well settled a part of the judicial power and as necessary to its administration as the functions of juries in common-law cases. Our institutions are framed to protect all rights. When they vest judicial power, they do so in accordance with all its essentials, and when they vest it in any court, they vest it as efficient for the protection of rights and not subject to be distorted or made inadequate. The right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury. Whatever may be the machinery for gathering testimony or enforcing decrees, the facts of the law must be decided together; and when a chancellor desires to have the aid of a jury to find out how the facts appear to such unprofessional men, it can only be done by submitting single issues of pure facts, and they can not foreclose him in his conclusion unless they convince his judgment.

"Theory amounts to nothing in the history of jurisprudence. The system of chancery jurisprudence has been developed as carefully and as judiciously as any part of the legal system, and the judicial power includes it, and must always include it. Any change which transfers the power that belongs to a judge to a jury, or to any other person or body, is as plain a violation of the constitution as one which should give the courts executive or legislative power vested elsewhere. The cognizance of equitable questions belongs to the judiciary as a part of the judicial power, and under our constitution must remain vested where it always has been vested heretofore."

On the subject of the constitutional incapacity of Congress to impair the independence of the judiciary by depriving it of the power to maintain its dignity and enforce its decrees, by compelling it to submit the decision of the facts to the determination of a jury in contempt cases, I will also quote a few cases.

In Gompers *v.* Bucks Stove & Range Co. (221 U. S., 450) the court settled this matter by declaring:

"For while it is sparingly to be used, yet the power of courts to punish for contempt is a necessary and integral part of the independence of the judiciary, and is absolutely

essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration whose judgments and decrees would be only advisory.

"If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery.

"This power 'has been uniformly held to be necessary to the protection of the court from insults and oppressions while in the ordinary exercise of its duties, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of suitors.' (Bessette *v.* Conkey, 194 U. S., 324, 333.)

"There has been general recognition of the fact that the courts are clothed with this power, and must be authorized to exercise it without referring the issues of fact or law to another tribunal or to a jury in the same tribunal. For if there was no such authority in the first instance there would be no power to enforce its orders if they were disregarded in such independent investigation. Without authority to act promptly and independently, the courts could not administer public justice or enforce the rights of private litigants." (Bessette *v.* Conkey, 194 U. S., 337.)

In Smith *v.* Speed (11 Okla., 95) the Supreme Court of Oklahoma declared unconstitutional an act of the legislature which required the court in cases of indirect contempt to submit the matter to a jury. In the course of its opinion, at page 104, it said:

"If it now should be found that the judge had no power to enforce his order at all or to punish for contempt, and that the court had no power to punish beyond a fine of $50 and imprisonment not exceeding a longer period than 10 days in the county jail, and that a change of judge may be had and a change of venue from the county, and that a trial by jury may be had to determine whether the recalcitrant party is in contempt at all or not, it will be admitted by the bar, acquainted with the law's delays, that the power to punish for contempt, either direct or indirect, being destroyed in the judge, will be to a great extent destroyed also in the court and rendered valueless.

"If the contention now sought for by the plaintiff in error should be sustained, it would go to the extent that the court, in equitable proceedings, after a full hearing and a final determination and judgment upon the merits, is without the power to enforce its judgments by the imposition of a pecuniary penalty or imprisonment, and that in the endeavor to enforce its judgment by proceedings in contempt it would be subject to have its final judgment brought into review in the contempt proceedings upon a change of judge, or of venue, to a completely new jurisdiction and to a trial by jury, in which the merits of the final order, which has been made by the court, in the proceeding, should again be reviewed, including the question whether there was any merit, right, or authority of the court in the equitable proceedings in which the judgment had been rendered or the order made, and the equitable jurisdiction of the district court upon matters finally determined would thus be subject to be again brought in question by another judge in another venue and by a jury, a thing unheard of in the chancery jurisdiction. If such a state of things could be, it could but result in the degradation of courts, and to make them truly the subjects of contempt."

In the Debs case (158 U. S., 594) Mr. Justice Brewer, in giving the opinion of the court, said:

"The power of a court to make an order carries with it their equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been from time immemorial the special function of the court. This is no technical rule. In order that the court may compel obedience to its orders, it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it jury or another court, will operate to deprive the proceeding of half its efficiency."

And the Supreme Court in deciding the Debs case adopted the declaration made in Watson *v.* Williams (36 Miss., 331, 341), in which it was declared that—

"The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record and coexisting with them by the wise provisions of the common law. A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees against the recusant parties before it, would be a disgrace to the legislation and a stigma upon the age which invented it."

In the light of the foregoing observations, principles, and decisions it is clear that H. R. 13578 is obnoxious to the Constitution and that it ought not to be passed, and since H. R. 1617, H. R. 1722, H. R. 1720, H. R. 4422, H. R. 4688, H. R. 5605, H. R. 11485, H. R. 9, and H. R. 9435 are all bills to provide for a trial by jury in proceedings for the punishment of contempts, they are for the same reason unconstitutional and ought not to be passed.

Appendix B.

[Re bill No. 13578, United States House of Representatives.]

Memorandum Submitted by Horace Pettit, of Philadelphia, in Opposition to the Bill.

To the honorable Judiciary Committee:

The following brief memorandum is submitted pursuant to a privilege given by Hon. Henry D. Clayton, chairman of the committee, at the conclusion of my remarks before the committee at the public hearing on Thursday, December 7, 1911.

A very full consideration of the decisions relative to the contention that the bill as drafted could not be sustained in the courts, if passed, was presented by Daniel Davenport, Esq., in his remarks to the committee on the same date, with the privilege of filing a fuller memorandum of authorities if desired, and in view of this fact the present memorandum will not discuss the general subject in this manner nor burden the committee with a repetition of the consideration of the numerous cases bearing upon the question.

It is desired merely here to briefly point out the effect which such a bill would have upon injunctions in equity, in depriving the court of its inherent right to punish violators of its decrees without referring the issues to a jury or to another tribunal.

UNDER THE PRESENT LAWS THE POWER TO PUNISH RESTRICTED, AS CONSTRUED BY THE COURTS.

It is desired to point out preliminarily many difficulties which have presented themselves in some of the courts, even under the law as it at present exists, in view of the decision of the Supreme Court of the United States in Gompers *v.* Bucks Stove & Range Co. (221 U. S. Rep., p. 492, etc.), in punishing violators of the decree of the courts in equity suits. Instances of this character have arisen recently in a number of cases in the United States Circuit Court for the Southern District of New York, where infringers who have been enjoined by decree of the court from violating patent rights have continued the infringement, notwithstanding the injunction. If such difficulties exist under the law relative to contempt as it stands to-day, much greater difficulties attending the enforcement of the decrees of court will be encountered should the bill now before your honorable committee, No. 13578, be passed. The difficulties under the present law, by virtue of the recent decisions of the circuit court for the southern district of New York, may possibly be overcome by a different method of procedure under the present law, or the opinions referred to may be reversed or modified.

I would, therefore, suggest that the present law remain unchanged, as doubtless efficient remedy can be had under the law as it exists to-day.

The United States Circuit Court for the Southern District of New York has construed the decision in the Gompers case in effect substantially as follows:

(1) That in cases of violation of a prohibitive injunction, the defendant in attachment proceedings in that cause can not be imprisoned;

(2) That in cases of a prohibitive injunction, a defendant violating the decree can only be fined to the extent of the pecuniary injury proven by the complainant, to be caused by the act of disobedience.

Injunctions are of a prohibitive character, especially in patent litigations.

Therefore, a defendant, if the construction given by the United States Circuit Court for the Southern District of New York to the Gompers case be correct, who is a violator of a decree of the court in an equity suit such as a patent case, can proceed merrily with the continued violation of the patent, irrespective of the decree of the court, with only the fear of being obliged to pay, if called into court, a nominal fine, as in ordinary cases it is practically impossible to show any great damage to the complainant in dollars and cents by a specific act of contempt.

For instance, if the defendant, who has been enjoined from violating the patent, should continue to violate under this holding, he will perhaps only be required under such a showing as the complainant could make, to pay as a fine, say twenty-five or one hundred dollars; though by continuing to infringe and still conducting his business, his infringing manufacture of the patented goods, he may in that period of time make profits of thousands of dollars. A defendant, therefore, knowing this, would not be deterred by the fear of a nominal fine from continuing to do what the court has enjoined him from doing.

It is true that the court also holds that proceedings in the nature of criminal proceedings may be instituted against the defendant for alleged contempt, but this of itself requires a different method of procedure at the hands of the United States district attorney, and might require a character of proof being of a criminal nature,

which ought not and should not be required of a violator of a decree of a court in equity.

In the case of Solar Light Co. *v.* Rubin, Judge Lacombe is unofficially reported to have made the statement in the United States Circuit Court for the Southern District of New York, from the bench, at a hearing of a contempt motion on October 6, 1911, substantially as follows:

"The Gompers case held this:

"In a case of an order of the circuit court directing a man to do something, the court on an application to punish for contempt may imprison him until he obeys the order.

"If the court orders a man not to do something and he disobeys the order of the court, on an application to punish for contempt can not imprison the man for that contempt nor punish by a fine for the benefit of the United States. The utmost measure of the fine it may impose is the exact amount of money the complainant can show he has lost by the specific act of which he complains.

"Nevertheless if the papers show the order of the court has been disobeyed and the matter is flagrant enough the matter may be brought to the attention of the district attorney for criminal action.

"Of course I realize that this puts an almost impossible burden on the complainant.

"COUNSEL. Then do I understand your honor to mean that this court is practically powerless to enforce its decrees?

"The COURT. Unless the actual money loss can be shown it would seem so."

In the case of Victor Talking Machine Co. *v.* Spiegel, the same judge, on motion to punish for contempt, filed a short opinion as follows:

"Lacombe, C. J.

"Disobedience of an injunction forbidding the further sale of infringing machines is undoubtedly shown and were it not for the decision of the Supreme Court in the Gompers case (221 U. S.), I should be inclined to inflict some fine proportioned to the gravity of the offense. But that decision seems to hold that the fine to be inflicted in a civil application to punish for contempt can be only one calculated to make the complainant whole for such loss or damage as it has sustained by reason of the forbidden sale. There is nothing in the papers to show the extent of such loss or damage and the motion must therefore be denied."

Under the old rulings of the court, prior to the decision in the Gompers case, it was not necessary that the papers should show the extent of the loss or damage such as referred to in the last-mentioned case.

In another case of the Victor Talking Machine Co. et al. *v.* Louis Greenberg, in the same court, a like disposition was made of the motion to punish for contempt.

If the Circuit Court for the Southern District of New York has misunderstood or misconstrued the Gompers decision in this regard, the matter will doubtless be corrected, or perhaps effective measures, by a slightly different method of procedure, as suggested in the Gompers case, employed with effective results.

It is, therefore, respectfully submitted that the present law, if it is amended at all, should not be amended by diminishing the powers of the court or circumscribing the inherent right of the judge to punish contempts of his decrees, but if anything they should be amplified so as to preserve the dignity of the court. It is thought, however, that the present law, section 725, Revised Statutes, reenacted in section 268 of the new judicial code, to go into effect January 1, 1912, will be sufficient for this purpose.

To, however, curtail and diminish the inherent right of the court to punish adequately violation of its decrees, it is respectfully submitted, would strike deeply and tend to shake the foundations and stability of the courts, upon which is built the substantial structures of our judicial institutions, upon which rests so largely the liberty as well as the protection of the citizens of the United States.

THE POWER TO PUNISH INHERENT IN THE POWER TO ADMINISTER JUSTICE IN ALL COURTS.

The power to punish is an inherent right under the Constitution of the United States vested in the courts which are established by virtue thereof. Such a right does not have to be specifically delegated by act of Congress, but is an inherent right vested by virtue of the Constitution, and must always be so.

One of the first and foremost axioms in equity is that "a court of equity will never make a decree which it can not enforce."

The tendency of the present bill, No. 13578, to relegate to trial by jury the question of contempt, tends at once to rob the court of this inherent right given to it by the Constitution, as interpreted by a long line of decisions, and to, in effect, render the decree more or less of a nullity. It is submitted that Congress can not by such a bill, in classifying between "direct" and "indirect" contempts, rob the court of this power by including certain contempts under the class of "indirect" contempts, to be relegated to a jury.

A long line of cases relative to contempt, which need not be cited, show that one of the powers of which a court is most jealous is its right to punish a violation of its decree. In fact, a defendant under injunction of court, under a long line of decisions, must steer clear of any infraction or possible infraction of the writ of injunction. In cases of doubt, a defendant before doing a questionable act, has the right and privilege to come into court to show his good intentions before committing acts which may be construed in violation, or take the consequences.

GOMPERS V. BUCKS STOVE & RANGE CO.

(221 U. S., 492.)

It is submitted that we do not have to go beyond the decision in the Gompers case to show that bill No. 13578 embodies material provisions directly in conflict with the law as laid down in this case. On page 501 the Supreme Court distinctly states that the courts are clothed with the inherent right to punish contempt without referring the question to a jury in the same tribunal and without referring the issues of fact or law to another tribunal. It also discusses this inherent right in the opinion, filed by Judge Lamar, and says:

"For while it is sparingly to be used, yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration, whose judgments and decrees would be only advisory.

"If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery.

"This power 'has been uniformly held to be necessary to the protection of the court from insults and oppression while in the ordinary exercise of its duty, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of citizens.' (Bessette *v.* W. B. Conkey Co., 194 U. S., 333, 48 L. ed. 1004, 24 Sup. Ct. Rep., 665.)

"There has been general recognition of the fact that the courts are clothed with this power, and must be authorized to exercise it without referring the issues of fact or law to another tribunal or to a jury in the same tribunal. For, if there was no such authority in the first instance, there would be no power to enforce its orders if they were disregarded in such independent investigation. Without authority to act promptly and independently the courts could not administer public justice or enforce the rights of private litigants." (Bessette *v.* W. B. Conkey Co., 194 U. S., 337, 48 L. ed. 1005, 24 Sup. Ct. Rep., 665.)

It is true that, as indicated in the Gompers case, the courts must exercise this power with discretion—the defendant, however, is abundantly protected—for in case of an abuse of discretion of the court there is an appeal to a higher tribunal.

As before indicated, in view of the other memorandums to be submitted by other parties, more thoroughly reviewing the decisions, we will not attempt here to burden the committee with a further consideration of these numerous cases which can, and will be, cited by other parties; suffice it to say that from a practical standpoint, should bill No. 13578 pass, and become a law, the results would be a dire and effective blow at the foundations of our system of judicial institutions, rob the courts of their dignity, and preclude litigants from obtaining justice required in our form of government.

If a Federal judge is fit to be appointed to the high place which he occupies, in determining the rights of parties, we must rest satisfied that he is fit to administrate punishment for violation of the court's decrees; if he extends his powers by abuse of discretion the injured party has a right of appeal. We must under our systen of government have confidence and reliance in our Federal judges that they will properly exercise the powers given them so long as they remain upon the bench. Any other theory is subversive of the theory of our system.

It is respectfully submitted that section 268 of the new judicial code, so carefully prepared, which is to go into effect January 1, 1912, should remain as it is, unaltered and unchanged, following word for word as it does section 725 of the Revised Statutes, and have the benefit of a line of decisions construing that section.

To make now a new law will be to undo all the work that has been done before the courts in construing this section. It is further respectfully submitted, for the reasons hereinbefore given, and for many other reasons urged in other memoranda opposing this bill, that House bill No. 13578 should not receive the approval of this honorable committee.

All of which is respectfully submitted.

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